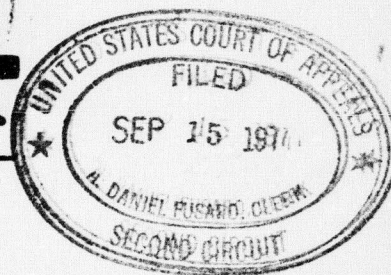


***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6114



In The

United States Court of Appeals

For The Second Circuit

FRIENDSHIP DAIRIES, INC., POLLIO DAIRY
PRODUCTS CORP., CROWLEY FOODS, INC.,
QUEENSBORO FARM PRODUCTS INC., SARATOGA
DAIRY, INC., DELTOWN FOODS, INC., ELMHURST
MILK AND CREAM CO., INC., QUEEN'S FARMS, INC.,
and CUBA CHEESE AND TRADING CO., INC.,

Plaintiffs-Appellants,

-against-

EARL BUTZ, Secretary of the Department of Agriculture of the
United States,

Defendant-Appellee,

-and-

PENNMARVA DAIRYMEN'S COOPERATIVE
FEDERATION, INC.,

Intervenor-Appellee.

*From an Order and Judgment of the United States District
Court for the Eastern District of New York in 75c 1517.*

JOINT APPENDIX

Volume V, pp. 1171a - End

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P R O C E E D I N G S

JUDGE CAMPBELL: Gentlemen, the hearing is in order.

This proceeding, which was instituted by the filing of petitions by ten petitioners, is identified for brevity as in re Cuba Cheese Company, et al, AMA Docket No. M2-48, et al, and has been instituted pursuant to Section ^{8c 15} ~~4616~~ of the Agricultural Marketing Agreement Act of 1937.

My name is John Campbell. I am an administrative law judge, and I have been designated to conduct this hearing.

The proceeding will be conducted in accordance with Sections 900.50 through 900.70 of the Rules of Practice governing proceedings to modify or be exempted from marketing orders.

These rules appear in Volume 7 of the Code of Federal regulations.

Just briefly, I would like to mention that testimony will be under oath or by affirmation, and cross-examination will be permitted to the extent necessary to develop the facts fully. If a party objects to the admission or rejection of any evidence, he shall state the grounds for such objection. If the objection is overruled, an automatic exception will be followed, which may be pursued in your briefs and section of appeal.

I would request that the parties provide me

1 with 4 copies of all exhibits which are to be introduced,
2 and I would request that you provide a copy of each exhibit
3 to each of the opposing counsel.

4 MR. BRADLEY: I object, your Honor. I didn't
5 received copy of your written order stating four copies.
6 I had your written order stating that you required only
7 three, so I came prepared with only three.

8 JUDGE CAMPBELL: I did mention three, and so the
9 three will be adequate.

10 This morning, beginning at 11 o'clock, a brief
11 pre-hearing conference was conducted. Generally, it is
12 agreed at the pre-hearing conference that official notice
13 would be taken of the hearing transcript of the promulgation
14 record which took place from February 20th to February 28,
15 1974 in Washington, D.C., which is the subject matter of this
16 litigation.

17 I believe the docket numbers are A0160-851 and
18 A071-A68.

19 We will take official notice of, or incorporate
20 by reference the entire record. That would include
21 the hearing notice, the briefs that were filed, and the
22 recommended decision, and the final order, the entire record,
23 in other words.

24 It was agreed too at the pre-hearing conference
25 that this proceeding would be a joint proceeding. At one

1 point there was some consideration of a severance, but
2 it was generally agreed that this would be a joint hearing.

3 MR. BRADLEY: If it would be appropriate at
4 this point, your Honor, we had discussed the concept that
5 the Lehigh Valley Cooperative Farmers was in a different po-
6 sition than the other petitioners in that we have a group
7 of milk producers rather than handlers, having only a minor
8 handling function in connection with the cheese plant; but
9 we felt in order to avoid duplication of record and so on,
10 that for the purposes of the record, we would agree to a
11 consolidated hearing and not join in the order your Honor
12 entered.

13 However, we would point out that there would be
14 a different thrust of the hearing with regard to Lehigh
15 Valley Cooperative Farmers.

16 MR. PALMER: I didn't address myself to that be-
17 fore, but just so that the record won't be too garbled,
18 Lehigh is here in its capacity as a handler, and in that
19 *position* situation, what effects the order has upon it as a handler,
20 and I don't really think the producer aspect has anything
21 to do with the present petition, although we would agree
22 that in addition to being a handler, Lehigh Valley is also
23 a cooperative association which has members who are producers
24 of milk.

25 MR. BRADLEY: To make clear my position, your

1 Honor, it was that the Secretary is mandated to encourage
2 cooperatives, cooperatives of milk producers which we are,
3 and that the effect on this petitioner as a group of pro-
4 ducers could be quite devastating.

5 JUDGE CAMPBELL: All right, gentlemen, I don't
6 think any ruling is required. I think you have made your
7 point clear for the record, and I think we will go on.

8 Also --

9 MR. TOOMEY: Excuse me, your Honor.

10 JUDGE CAMPBELL: Yes, sir.

11 MR. TOOMEY: On that point, and just for clarifi-
12 cation, I am correct, am I not, that in view of the fact
13 that it is a consolidated hearing, that evidence produced by
14 me on behalf of my clients is available for Lehigh Valley
15 and vice versa, since we are all petitioners in a consolidat-
16 ed hearing. Is that correct?

17 JUDGE CAMPBELL: That would be my understanding,
18 sir.

19 MR. TOOMEY: Fine. Thank you.

20 JUDGE CAMPBELL: Perhaps I had better take appear-
21 ances. Who appears for petitioner Cuba Cheese, et al?

22 MR. TOOMEY: Duane, Morris and Heckscher, by
23 David Toomey and Roland Morris, although only Mr. Toomey --
24 that is me -- is here at the moment.

25 JUDGE CAMPBELL: Who appears for the petitioner

1 Lehigh Valley?

2 MR. BRADLEY: Saul, Swing, Benick & Saul firm
3 and also H.C. Pedderson of the District of Columbia bar.

4 JUDGE CAMPBELL: Who appears for the respondent?

5 MR. PALMER: Victor W. Palmer and Daniel Wentzell,
6 attorneys for the Department of Agriculture, Office of the
7 General Counsel, Department of Agriculture, Washington, D.C.

8 JUDGE CAMPBELL: Thank you, gentlemen. I just
9 wanted to make one more comment about the pre-hearing confer-
10 ence.

11 While I cited the points of agreement -- I think
12 they are points of agreement -- there was some disagreement
13 expressed concerning a request to intervene, as well as the
14 introduction of other evidence to supplement the promulga-
15 tion hearing record. I reserved ruling in these matters in
16 order that these points may be considered and developed fully
17 on the record.

18 I think that is about all I have to say.

19 Is there any matter of general nature to be con-
20 sidered before we take testimony?

21 MR. COPELAND: Your Honor please, my name is Donald
22 F. Copeland. My address is 617 Fort Center Plaza, Phila-
23 delphia, Pennsylvania.

24 In behalf of my clients, Penn Marva Dairymen's
25 Cooperative Association, Inc., I would like to move to

1 intervene in this proceeding.

2 My clients are Penn Marva Dairymen's Cooperative
3 Federation, Inc. Their address is 1717 Green Oak Avenue,
4 Baltimore, Maryland, and the individual members thereof are
5 Interstate Milk Producers Cooperative, Maryland Cooperative
6 Milk Producers, Inc., and Maryland and Virginia Milk Pro-
7 ducers Association.

8 Your Honor please, Penn Marva was a major partici-
9 pant in the promulgation hearings, which lead to the order
10 which is here under attack. In addition, at such time as the
11 order was filed in the Federal District Court in Washington
12 before Judge Flannery, we were permitted to interfere in
13 that matter on the grounds that we had a substantial
14 interest, and we did participate as a party on the side of
15 the defendant, the Secretary of Agriculture.

16 We are here moving to intervene in this proceeding
17 on the side of the respondent, the Secretary of Agriculture,
18 and basically, our reason for doing so is that we have a
19 substantial interest in the matter before your Honor.

20 As I pointed out, we participated in the promul-
21 gation record, and in the action in Washington.

22 Further, we have substantial producers who market
23 milk, not only produce milk, but market milk under Order 4.
24 We represent over 50 per cent of the producers in Order 4.
25 In addition, we have producers in Order -2.

1 From my understanding of the matter before Your
2 Honor here, in this disciplinary proceeding, the basic
3 thrust of the action has to do with the validity of the Minn-
4 Wisconsin trade series hearings, and any decision which
5 your Honor or the Secretary of Agriculture on this matter
6 will have a substantial effect upon the producers whom I
7 represent.

8 Further, it is clear from the petition that this
9 particular aspect of the Minnesota-Wisconsin pricing is used
10 to price milk not only in Order 4, but also the Mid-Atlantic
11 order, but also in Order 2; and several others; and I under-
12 stand your Honor's ruling, this is a joint hearing, and I
13 think that under the provisions of 900.57 of the Code of
14 Federal Regulations, we should have a right to intervene in-
15 sofar as and to the extent that your Honor will permit us
16 to participate.

17 We would like to have as full participation as
18 possible. Thank you.

19 JUDGE CAMPBELL: Anyone wish to be heard with
20 respect to the motion?

21 MR. TOOMEY: Very briefly, your Honor. On behalf
22 of my clients, all of whom are located in New York, in the
23 Order 2 area, this is the first I have heard that any of
24 the members of Penn Marva are active in Order 2 at all.

25 Assuming that that is correct, they are very minor

1 part of Order 2, and we are here dealing, so far as my
2 clients are concerned, with the provisions of Order 2 and
3 not the national picture, and I question whether, in fact,
4 there is any substantial interest on the part of Penn Marva
5 being involved in the Order 2 portion of this matter.

6 MR. BRADLEY: I would join in Mr. Toomey's objec-
7 tion and also ask if it would be in order to have counsel
8 for Penn Marva state the purpose and thrust of his inter-
9 vention in some detail, as to whether this is on our side,
10 is he for us or against us?

11 MR. COPELAND: I would be very happy. We would
12 like to intervene on behalf of the side of the respondent,
13 the Secretary of Agriculture.

14 MR. BRADLEY: I don't understand the purpose or
15 the reasons.

16 MR. COPELAND: I think the reasons are clear, if
17 your Honor please, that we are marketing milk under the
18 terms of this order, and the petitioners here are attempting
19 to attack that order, which has a substantial effect upon
20 our producers.

21 MR. BRADLEY: Your Honor, we are not attacking
22 the order. We are attacking the hearing and the method in
23 which the order was entered.

24 JUDGE CAMPBELL: I would assume the outcome, the
25 decision and so on, would follow the hearing.

MR. BRADLEY: But I don't see how the end of

1 these hearings would affect Penn Murva. We are concerned
2 with the fatality of the order which eliminated from it
3 the —

4 JUDGE CAMPBELL: Let me ask a question. How many
5 orders were involved in this?

6 MR. BRADLEY: Eight.

7 JUDGE CAMPBELL: So I would assume -- let's just
8 assume that I were to declare the Secretary's action un-
9 lawful, and I would assume that that would involve eight
10 orders, not just Order No. 2 and Order No. 4.

11 MR. TOOMEY: No, sir; your Honor. That is not
12 correct.

13 We are attacking here only the question of
14 Order No. 2, whatever may be the situation in Indiana or
15 in the Ohio Valley is of no concern to us nor is it part
16 of this hearing.

17 The only questions here are Order 2 and Order 4,
18 and in particular, as indicated this morning, one of the
19 reasons upon which we attack the order is the fact that it
20 was done as part of a national program instead of taking into
21 consideration local effect.

22 As far as this proceeding is concerned, we
23 are not attacking whatever was done in Western Pennsylvania
24 or Ohio, and I don't believe that matter is before your Honor
25 at all.

1 JUDGE CAMPBELL: Thank you, sir.

2 MR. COPLAND: Your Honor please, I don't see how
3 this can be done in a vacuum. In any event, 800.57 clear-
4 ly provides that any person having a substantial interest
5 in the outcome of the proceedings shall be permitted to
6 participate in oral argument and final briefs, so I think
7 that to be fair to the Secretary and to all the parties here,
8 that Pond Marva has a substantial interest in that we repre-
9 sent over 50 per cent of the milk producers marketing milk
10 under Order 4; and if that isn't a substantial interest, I
11 don't know what is.

12 JUDGE CAMPBELL: Gentlemen, I don't think we need
13 any further argument. Mr. Copeland, to the extent that the
14 Rules of Practice permit limited interventions, I will allow
15 and grant the motion to intervene, to the extent that you
16 may file a brief and participate in oral arguments.

17 MR. PALMER: I have not participated in the dis-
18 cussions.

19 JUDGE CAMPBELL: I am sorry, Mr. Palmer.

20 MR. PALMER: There are certain things that were
21 stated. My silence does not mean I agree or disagree. I am
22 not necessarily in agreement with Mr. Toomey's statement,
23 for example, that this would only affect Orders 2 and 4, but
24 I don't think it is necessary to discuss my point of view
25 and the particular ruling right now.

1 JUDGE CAMPBELL: All right. The motion to inter-
2 vene is granted to the extent that it is permitted by Rule 57.

3 Anything further to be considered of a general
4 nature before we begin the taking of testimony?

5 (There was no response.)

6 JUDGE CAMPBELL: Gentlemen, who shall go first?
7 Cuba Cheese or Lehigh?

8 MR. BRADLEY: Cuba Cheese.

9 JUDGE CAMPBELL: Do you want to call your first
10 witness, sir?

11 MR. TOOMEY: Yes, sir; a couple of preliminary
12 matters, if I may, your Honor. With respect to the names,
13 addresses, principal places of business, State of incorpora-
14 tion, and identification of the petitioners as handlers
15 subject to Order No. 2, I should like to offer into evidence
16 Paragraph 1 of the petitions which I have filed on behalf
17 of my clients and the answers to that paragraph filed by
18 the Department of Agriculture.

19 JUDGE CAMPBELL: I think the pleadings are part
20 of this record.

21 MR. TOOMEY: I think they need to be offered as
22 admissions to the extent that they are admissions, and to
23 the extent that they are supplementary material contained
24 in the answers by the Department of Agriculture, and I accept
25 that as part of my case.

1 I understand that your Honor has -- and I raise
2 this solely because I think your Honor inadvertently misspoke
3 about one thing--I would like, with respect to the evidence,
4 to offer into evidence the hearing, ask the Court to take
5 official notice and incorporate in this record the notice
6 of the hearing, that was held on February 20th to 23th,
7 the transcript of the hearing --

8 JUDGE CAMPBELL: Is that the hearing notice that
9 was published in the Federal Register?

10 MR. TOOMEY: Yes, the hearing notice published
11 in the Federal Register, the hearing transcript, and the
12 exhibits, exceptions, and briefs which were filed in that
13 proceeding.

14 JUDGE CAMPBELL: Were there exceptions filed?

15 MR. TOOMEY: Yes, sir.

16 JUDGE CAMPBELL: I think earlier I asked in the
17 pre-hearing if that were an emergency.

18 MR. TOOMEY: There were two sets of exceptions,
19 if you will, your Honor and briefs.

20 JUDGE CAMPBELL: Right.

21 MR. TOOMEY: There were exceptions and briefs filed
22 on the question of whether there should be an emergency
23 hearing, and there was a further set of briefs and exceptions
24 on what the long-range order should be, the permanent order.

25 This was done at one time.

1 There were in effect two sets of briefing dead-
2 lines that were established by Judge McAlpine, so I ask your
3 Honor take into account papers filed in accordance with
4 that procedure.

5 I ask your Honor to take in or to incorporate
6 in this record Secretary's order dated March 27, 1974.
7 In this regard, I think your Honor spoke of the recommended
8 decision. There was no recommended decision with respect
9 to that order, and that is one of the bases upon which we
10 are attacking the order.

11 JUDGE CAMPBELL: I see.

12 MR. TOOMEY: Finally, I ask your Honor to incor-
13 porate as part of this record, the recommended decision and
14 order dated June 21, 1974, again under the docket numbers
15 which your Honor has already cited into the record.

16 MR. PALMER: Would it help if I gave the Federal
17 Register cites, just so you would have them at hand?

18 JUDGE CAMPBELL: Yes.

19 MR. TOOMEY: That would be helpful.

20 MR. PALMER: I have the dates in terms of publica-
21 tion in the Federal Register. They are usually signed by
22 the Secretary a day or two earlier. The notice of hearing
23 appeared at 39 Federal Register 5642, and was published on
24 February 14, 1974.

25 The hearing itself then was conducted between

1 the dates of February 20th to February 28, 1974.

2 Part of the subject matter of that hearing, your
3 Honor, was both the need for amendment of the order and an
4 emergency. There was an emergency in existence. A partial
5 decision thereafter was issued, which was published 39
6 Federal Register 11567. The date of issuance of it was
7 March 27th; the date of publication was March 29, 1974.

8 That dealt with the emergency; and as I say, it
9 was a partial decision.

10 The order implementing the partial decision was
11 published 39 Federal Register 11980 on April 2, 1974.

12 That really concludes the subject matter of this
13 particular proceeding.

14 The next document that Mr. Toomey referred to
15 is the recommended decision -- in other words, implementing
16 the hearing on a long-term basis -- recommending or proposing
17 to. That was published in 39 Federal Register 23063. The
18 date of the recommended decision was June 21, 1974.

19 The date of its publication was June 26, 1974.

20 Does that help you?

21 MR. TOOMEY: I accept what Mr. Palmer has
22 indicated.

23 JUDGE CAMPBELL: All right, gentlemen, official
24 notice will be taken of this particular record which
25 has been cited by way of the Federal Register citation,

plus the briefs and exceptions that were filed in connection with that proceeding.

MR. TOOMEY: May I call Mr. Hammerman, your Honor.

Whereupon,

MAURICE HAMMERMAN

was called as a witness, and having been first duly sworn by the Administrative Law Judge, assumed the witness stand, and, upon examination, testified as follows:

DIRECT EXAMINATION

BY MR. TOOMEY:

Q Mr. Hammerman, would you state your full name and your address for the record, please?

A My name is Maurice Hammerman. I have an office at 18 East 48 Street, New York, New York 10017.

Q Your occupation is what, sir?

A I am a dairy consultant.

Q Among other clients, you are a consultant to the petitioners that I am representing in this matter?

A Yes.

MR. PALMER: Could I just ask a question? Are you a member of the Bar?

THE WITNESS: No.

BY MR. TOOMEY:

Q Can you advise us for the record, sir, how long

1 you have been engaged in the milk industry and in what
2 capacities?

3 A I have been engaged in the milk industry for 39
4 years. I was employed by the Division of Milk Control of
5 the State of New York as a milk accounts examiner from 1935
6 to 1938. I was employed by the Market Administrator of what
7 is now Order No. 2 from 1938 to 1944.

8 I was Controller of Queensboro Farm Products,
9 a handler under Order 2, from 1944 to 1957.

10 During that entire period I was a member of the
11 Market Order Committee of the Milk Dealers Association of
12 Metropolitan New York and appeared as an expert witness at
13 numerous hearings during that period.

14 Since 1957, I have been a dairy consultant, re-
15 tained by a number of handlers under Order 2. Also by
16 various cooperatives, associations, and producer-handlers
17 throughout the United States.

18 Q In the process of doing the work which you have
19 been doing, have you had occasion to become familiar with
20 the Federal order system, and in particular then with the
21 provisions of Order No. 2, sir?

22 A Yes.

23 Q Did you participate in the hearings which were
24 held from February 20 to 28th, which is the subject matter
25 of this proceeding, sir?

1 A Yes.

2 Q In what capacity?

3 A I represented a group of handlers under Order No
4 2, and appeared there as a proponent of one proposal in
5 the hearing notice, and in opposition to a number of other
6 proposals that came up at that hearing.

7 Q You are familiar with the provisions of the order
8 dated March 27, 1974, which went into effect in early
9 April?

10 A The amendments to the market order.

11 Q Yes.

12 A Yes.

13 Q While the order speaks for itself, would you
14 just describe briefly the change which that order brought
15 into effect?

16 A Prior to that order going into effect on April 3,
17 1974, the pricing provisions of Order No. 2 called for the
18 use of either the Minnesota-Wisconsin price series or price
19 obtained by the use of butter and powder formula the latter
20 being adjusted by make allowance of 48 cents, and both
21 alternative uses have season differentials.

22 The order provided that the lower of the two prices
23 be used in a particular month.

24 The decision that was effective on April 3, 1974,
25 and is to remain in effect through July 31, 1974, eliminated

1 the alternative of using the low of the two prices, and instead
2 established that the Minnesota-Wisconsin price series be
3 used solely to the extent of that which is utilized in
4 the manufacture of butter/and or butter/or powder that should
5 the price obtained by the butter powder formula be no greater
6 than 50 cents under the Minnesota-Wisconsin price, that
7 calculation would be used for those two products.

8 Q And we are talking here under Order No. 2 of
9 C lass 2 milk only.

10 A That is correct.

11 Q At the time of the hearing, what was the relation-
12 ship between the Minnesota-Wisconsin price and the butter-
13 powder price?

14 MR. PALMER: Objection. I know we are going
15 to -- I have not objected to this point because I thought
16 some qualifying questions were needed, but we are going, or
17 beginning to go into the area now where I must object be-
18 cause whatever the evidence was at the hearing, it is con-
19 tained in the transcript; and whatever testimony or evidence
20 could have been given at the hearing should have been given,
21 and I would point in fact to Mr. Hammerman's testimony.

22 I believe he testified twice in the hearing, but
23 I have testimony found in the hearing record on Pages 1022
24 through 1033, and most of it appears that what he is about
25 to talk about now he discussed then; and I think that we

1 should not expand the hearing record.

2 MR. TOOMEY: I solely was asking a preliminary
3 question, your Honor, because I am about to get into events
4 which have occurred subsequent to the hearing and to the
5 relationship between these two formulas, to the fact
6 that it was a totally unexpected relationship which resulted,
7 and to put into evidence certain calculations which Mr.
8 Hammerman has made as to the effect which this order would
9 have had had it been in effect between October and March;
10 namely, that my clients would have spent for Remanite over
11 \$8 million than they in fact had spent, and to tie this to
12 the testimony of Mr. Hammerman who I believe I qualified as
13 an expert in this area, that it is reasonable to anticipate
14 that while there has been no dollar effect of this amendment
15 to date, that it is reasonable to expect that this situation
16 will change in the future and that losses can be expected by
17 my clients as a result of this order.

18 MR. PALMER: Your Honor, as I pointed ^{before} ~~four~~, as far
19 as October and March, calculations that Mr. Hammerman may
20 have about what the pricing factors would have been in Octo-
21 ber of 1973 and March of -- I don't know how we got to
22 October and March, but that is the statement.

23 October certainly was before the hearing. March
24 would have been before the decision.

25 In any event, again, this would seem to be the type

1 evidence that should be taken care of at the hearing, any-
2 thing that preceded it.

3 I can see where Mr. Toomey may in some future
4 proceeding which he says he may contemplate filing on the
5 basis of the final decision that may come out of this hear-
6 ing record -- I can see where there would be some validity
7 there to getting into the future, but at this point of time
8 we are only dealing with an order that is going to expire
9 or terminate on July 31st, and to date there has been no
10 showing, and can't be any showing, of any damage whatsoever;
11 and to start speculating or to start formulating figures
12 and theories about what might happen at some time subsequent
13 to the termination date of this particular decision, I think
14 would get us all balled up.

15 MR. TOOMEY: Your Honor please, I think this is
16 directly relevant to showing harm. It is a -- we have been
17 faced with previously with the statement of what are you so
18 excited about this order for, because the butter-powder
19 formula price shot up and the Minnesota-Wisconsin formula
20 price shot down, so all of a sudden the expected price re-
21 lationship between the two is inverted, and it is argued how
22 have you been hurt.

23 We are talking on the basis that not only are
24 we indeed hurt, but we are attacking the emergency nature
25 of the procedures which were followed.

1 But we are putting this in for the standpoint of
2 a showing that indeed this procedure is a hurtful procedure
3 and there is a reason for our being here, even though these
4 unexpected things happened.

5 I show one other thing, your Honor please. It
6 shows what can happen as a result of an emergency, rush
7 hearing where we were given a total of eight days' notice to
8 charge into the hearing, go to the hearing, try and be pre-
9 pared, then have an order rushed out, and as a result, on
10 the basis of an assumed set of facts which turned out to
11 be completely wrong, because the assumption that the Minnesota-
12 Wisconsin price would remain at a higher level than butter
13 powder were not only made by us, but in an affidavit submit-
14 ted by us in the course of a lawsuit which I filed in
15 Washington, the United States Department of Agriculture
16 economists and experts predicted a differential of roughly
17 25 cents between the Minnesota-Wisconsin and butter powder,
18 and they, being the economists and experts in this field, were
19 50 cents off because it inverted the other way, which shows
20 the evil of rushing through this kind of a hearing and basing
21 an order on the kind of expedited practice which was followed
22 in this case.

23 MR. PALMER: We can all be good, as we say, Monday
24 quarterbacks. It is a question of whether or not the hearing
25 record at the time of the situation and the decision on that

1 hearing record --

2 MR. TOOMEY: May I make a proffer --

3 JUDGE CAMPBELL: Wait a minute. I haven't even
4 ruled yet. We have jumped from one question to an entire
5 line of questioning. As a matter of fact, I have forgotten
6 that last question now.

7 I would like to take that one question and then
8 go question by question., if you don't mind. I think it
9 would be better.

10 MR. TOOMEY: The question which I asked was at
11 the time of the order of March 27, 1974, what was the rela-
12 tionship between the Minnesota-Wisconsin formula and the
13 butter-powder formula. There is where we were.

14 JUDGE CAMPBELL: I will allow the question. Objec-
15 tion overruled.

16 A For a number of months starting with October,
17 1973 and March of 1974, the Minnesota-Wisconsin formula
18 exceeded the butter-powder formula price by these
19 respective amounts: 47 cents, 78 cents, \$1.13, \$1.18, \$1.19
20 and 73 cents.

21 Those are for the months of October, 1973 through
22 March of 1974.

23 BY MR. TOOMEY:

24 Q At the time of the order of March 27, 1974, based
25 on your expertise in the business, Mr. Hammerman, can you tell

us what was expected would be the relationship between these formulas in the months ahead?

A Yes. It was expected that the Minnesota - Wisconsin would be appreciably above the butter-cheese formula of pricing. In fact, I have read some estimates in publications put out by some cooperative association, like the NEDCO News, which is put out by NEDCO, the Northeast Dairy Cooperative, and the Dairy News, which is published by Dairy Lea.

They estimated, for example, that for the month of April, the Minnesota-Wisconsin price would be in the vicinity of \$8. In fact, I think they predicted exactly \$8, and it turned out the price that was used was somewhere around \$6.92 before adjustment for seasonal variation.

Q In fact, since the beginning of April, what has been the relationship between butter-powder and Minnesota-Wisconsin?

A For April and May -- and these are the only two months that we have to date -- the Minnesota-Wiscon price was appreciable lower than the price we would have obtained had we used the butter-powder method of pricing.

Q What about milk purchased during June?

A I can't tell you how it would be priced under either method because we won't get that price until July 5th.

Q Now, based upon your experience in the business,

1 sir, can you tell us whether you expect this situation with
2 the butter-powder formula being higher than the Minnesota-
3 Wisconsin to continue?

4 MR. PALMER: Object.

5 JUDGE CAMPBELL: Objection sustained.

6 MR. TOOMER: Excuse me for a minute, your Honor.

7 (After a pause.) Your Honor please, I apologize
8 for the interruption.

9 I should like to reserve, if I may, an exhibit
10 number for a copy of a letter from the Department of Agri-
11 culture in which it turned down the request of the various
12 handler organizations for in effect a floor of, I believe,
13 \$8.15 under the Minnesota-Wisconsin series for Class 1
14 milk, stating, as one of the reasons for its being turned
15 down, the fact that in the opinion of the Department, present
16 pricing relationships were temporary in nature and would
17 not be a long-run effect.

18 MR. PALMER: I would object to that exhibit for
19 much the same reasons I stated some time back on the subject
20 of the last objection.

21 In other words, we are now looking at events sub-
22 sequent to the hearing, and the case before us is whether
23 or not that decision was based upon a ^{evidence of} substantial record of
24 evidence at the hearing, and what has transpired since that
25 hearing in other hearings is not at issue here.

1 MR. TOOMEY: Did we establish what the date is
2 here?

3 MR. BRADLEY: It is from June 15th to June 20th.
4 It was a press release.

5 MR. TOOMEY: You see, your Honor, the effect of
6 this change, it is the position of my clients, will ultimately
7 be a substantial increase in their operating costs to the
8 point where they cannot as handlers absorb that kind of
9 loss, based upon the emergency type of record submitted
10 here; and here we have the Department saying that they
11 think this situation where we have not lost as a result of
12 this order is a temporary one, and once we start losing,
13 your Honor please -- and I will get to this exhibit in a
14 moment -- we will lose very, very substantial amounts of money.

15 Your Honor please, perhaps I can have this marked
16 as an exhibit.

17 JUDGE CAMPBELL: Mr. Palmer, do you want to look
18 at the exhibit? We will mark it Respondent's Exhibit 1 for
19 identification.

20 (Thereupon, the document referred to was marked

21 Respondent's Exhibit No. 1 for identification.)

22 MR. PALMER: Yes, sir; I would object to the
23 exhibit for the reasons stated before. The letter is dated
24 June 18, 1974.

25 MR. TOOMEY: We haven't identified it. Do you
want to identify it.

1 MR. PALMER: It is identified as Respondent's
2 Exhibit No. 1, just marked.

3 MR. TOOMEY: It is a letter on the letterhead of
4 the No. 2 Market Administrator.

5 MR. PALMER: As I say, it is dated June 18,
6 1974. The partial decision in this case was published on
7 March 29, 1974. The order itself became effective April 3,
8 1974, so we now have a document subsequent to that decision.

9 Again, I don't think this is the proper type of
10 evidence to bear upon whether or not that decision is sup-
11 ported by proper substantial evidence of record.

12 MR. TOOMEY: May I indicate what it is being
13 offered for, sir?

14 JUDGE CAMPBELL: Yes, sir; please.

15 MR. TOOMEY: It is being offered particularly
16 because this purports to be a news release issued by the
17 Department, and it is offered particularly for the second
18 paragraph thereof stating:

19 "The Department said that while milk prices have
20 fallen sharply during recent months, this is expected
21 to be a temporary situation reflecting in part a sea-
22 sonal imbalance of supply and demand."

23 JUDGE CAMPBELL: I am going to overrule your
24 objection, Mr. Palmer.

25 MR. TOOMEY: May I submit, your Honor, additional

1 copies of this exhibit subsequent to the hearing?

2 JUDGE CAMPBELL: Let me mark it and put my initials,
3 and you can send four copies to the hearing clerk and one
4 to me.

5 A I previously had testified to some estimates made
6 by two cooperatives associations. I referred to the esti-
7 mates for the month of April and May. Those estimates
8 were for the month of May, 1974, and I mentioned that the
9 actual price for that same month -- Minnesota-Wisconsin price--
10 was \$6.92. I have since refreshed my memory, and it was
11 \$6.93.

12 BY MR. TOOMEY:

13 Q Now, Mr. Hammerman, are you able to calculate my
14 future damage as a result of this order?

15 A No.

16 Q Why is that?

17 A I just don't know what the respective values
18 would come to, as between the use of Minnesota-Wisconsin
19 price series and the butter/powder method of computing the
20 Class 2 price.

21 Q Based on known figures, have you made any calcu-
22 lation at my request as to the effect which this order would
23 have had had it been in effect between October and March of
24 this year?

25 A Yes.

1 MR. PALMER: Objection. I think that is the
2 type evidence that could have been given at the rule-making
3 hearing.

4 JUDGE CAMPBELL: Yes. I am not sure what *about*
5 it probative value. What could have been, I am going to
6 sustain the objection.

7 MR. TOOMEY: Your Honor please, we could only put
8 it into the hearing if we knew in advance what the result of
the hearing was going to be.

10 MR. PALMER: Well, I really don't know where
11 this is taking us anyway. First of all, the order that would
12 -- the order that did come into effect wasn't a retro-
13 active order. It didn't affect the prices back in October.
14 The testimony in the record -- I think the testimony is
15 replete -- the producers were claiming that they were damaged
16 tremendously because the order was as it was, and obviously
17 if the prices had been the other way around, there damages
18 would have been diminished because certain handlers would
19 be paying more, so obviously, certainly handlers would be
20 paying more, but I certainly don't see where this takes us
21 in this hearing.

22 MR. TOOMEY: I think perhaps, your Honor -- let
23 me refresh my recollection. Mr. Palmer, do you recall whether
24 the price announcements from the orders -- Market Adminis-
25 trator Offices -- over a period of time were introduced in

1 the hearing?

2 MR. PALMER: I believe they were, but my
3 recollection could be incorrect. I believe they were.

4 MR. TOOMEY: Which would have been up to, at
5 that time, the January prices.

6 MR. PALMER: I believe they were. I seem to
7 recall, Mr. Toney, that there was some question about it,
8 and I think a whole series of price announcement came in
9 to obviate the problems people were having with evidence.

10 MR. TOOMEY: In that event, your Honor, I think
11 I can accomplish the same point by asking Mr. Hammerman if
12 at my request he has made calculations of the pounds pur-
13 chases of milk which my clients have made per month over
14 the period, because if the prices are already in, they can
15 then be calculated, if that in fact is in the record as
16 suggested.

17 MR. PALMER: Let me see if I understand the
18 question. You are going to calculate ^{for} each of your nine
19 clients.

20 MR. TOOMEY: The total of my nine clients.

21 MR. PALMER: I don't know where that takes us
22 either. After all, they are not one corporate entity.

23 MR. TOOMEY: I think that is the method which
24 is traditionally used to get figures in this kind of pro-
25 ceeding. It's to lump them into a group in order to preserve

the confidentiality of a given handler's figures, and for that reason the reason I asked Mr. Harmsman to do was to ^{obtain} ~~obtain~~ information from each of my clients on a confidential basis, -- so that no one handler would be in a position where his own confidential data would be exposed, -- lump them all together.

MR. PARKER: Mr. Toomey, let me see if I understand what you are saying. You are concerned that if the pounds of milk that each of your client handlers handled during each of these months were specified on an individual basis, it would be a problem with them losing and revealing confidential business information.

MR. TOOMEY: I think that's right.

MR. PARKER: I see.

MR. TOOMEY: By the same token, we are simply putting in poundage figures for the purpose of showing the fact that my clients are facing very, very substantial dollar losses.

If your Honor feels, that it is inappropriate--

JUDGE CHAMBERLAIN: Go ahead, Mr. Toomey. I will allow the question.

BY MR. TOOMEY:

Q At my request, Mr. Harmsman -- I don't know that we need to mark this as an exhibit because your Honor has indicated for the purpose of having the figures -- at my request, Mr. Harmsman, have you made calculations as to the

1 number of pounds of Class 2 Milk which the nine petitioners
2 in this matter have purchased during the months which I
3 referred to?

4 A Yes, I have. I might say that they are not
5 actual figures, they -- time didn't permit calling in to
6 the exact amounts for each of the petitioners for each of
7 these months; but I did use the figures for April, 1974,
8 and adjusted the percentage of Class 2 milk by the data
9 available in the Administrator's announcement that uniform
10 price each month to obtain the estimated quantity of Class 3
11 milk each of these handlers would have had.

12 I have to assume that their experience would
13 have been the same as the pool, as a whole. In other words,
14 while these are not precise figures, I think they are rea-
15 sonably correct, and I think the margin of error is quite
16 small.

17 Q What are they?

18 A Do you want me to give them for each month?

19 Q Yes.

20 A That based on a quantity of estimated Class 2
21 milk utilized by petitioners in October, 1973, and using a
22 figure of .47 cents as a difference by which the Minnesota-
23 Wisconsin exceeded the butter/powder price --

24 Q Excuse me, Mr. Hammerman. The question is only
25 the poundage.

1 A Oh, the postage.

2 Q That is right.

3 A October, 71,931,000 pounds.

4 Q November?

5 A 87,719,000 pounds.

6 Q December?

7 A 110,223,000 pounds.

8 Q January?

9 A 114,968,000 pounds.

10 Q February?

11 A 110,376,000 pounds.

12 Q March?

13 A 140,228,000 pounds.

14 Q April?

15 A 183,086,964 pounds.

16 Q MR. TOONEY: Now, your Honor, we requested at
17 the pre-hearing conference, the the consideration of the De-
18 partment in treating the hearing record in this matter as a
19 hearing record also with respect to the recommended decision
20 on the permanent order arising out of this hearing, and I
21 unders and, and I would like to -- as I think it was indicated
22 it is appropriate to raise it for a ruling at this point.

23 I would offer, on behalf of my clients, that the
24 record made in this proceeding would be the record -- we
25 stipulate it would be the same record made in a 15(a) pro-

1 ceeding from the final order which will take place presumably
2 on August 1 of this year and one month from today.

3 MR. PALMER: Your Honor, as I think I indicated
4 earlier, the problem here is we are getting into so many
5 hypotheticals. We are hypothesizing first that the final
6 decision will be the same as the recommended decision.

7 We are hypothesizing further that Mr. Toomey's
8 clients will be unhappy with that decision and will want to
9 file another petition or in some way amend this petition;
10 and I have indicated at the pre-trial conference that to the
11 extent that some subsequent petition is filed going to the
12 final decision that may come out of this hearing, that to
13 the extent that it would be help to utilize the evidence
14 that is brought forth in this hearing today, that we would
15 certainly wish anything to be done to accommodate the peti-
16 tioners to save time and expense; but the problem I have
17 is that the way Mr. Toomey has phrased it, and I think also
18 the line of questions that he is putting, he is thinking
19 ahead of this particular decision we have now, and I just
20 don't think we can do that.

21 If it turns out that the final decision is what
22 -- is the type that he wishes to make the subject of a 15(a)
23 proceeding, there may be some additional data that he would
24 want to put into evidence then; but I just don't think we
25 can consider it all right now.

1 Right now we are looking to the partial decision
2 that terminates July 31. Anything else would be completely
3 confusing.

4 JUDGE CAMPBELL: I think you are correct, Mr.
5 Palmer. We don't know what the final decision will be. I
6 think we might speculate, but we really don't know; and
7 again, we don't know whether additional petitions will be
8 filed in connection with the permanent order.

9 I would prefer to wait. I am sure that all parties
10 will be more than happy to incorporate this record into
11 another record, but I think we had better cross that bridge
12 at the proper time, sir. I think we had better wait and
13 see what the final decision is. I think we had better wait
14 to see if additional petitions are filed, after the permanent
15 order.

16 MR. TOOMEY: All right.

17 BY MR. TOOMEY:

18 Q Mr. Hammerman, did you attend the Washington hear-
19 ings?

20 A Yes.

21 Q During the course of the Washington hearings, did
22 you become aware of what has since become referred to as the
23 39 Order decision?

24 A Yes.

25 Q How did you become aware of it?

1 A Well, I first learned about it the first day
2 of the Washington hearing. That was on February 20, 1974.
3 During the recess -- and I don't recall now whether it was
4 during the morning recess or during the luncheon recess --
5 a press release was placed on our desks indicating a
6 decision on the manufacturing prices for those 39 orders.

7 Q Were you familiar with the background to that 39
8 Order decision?

9 A I recall that the hearings were held some three
10 years earlier. I think it was sometime in 1970, and a recom-
11 mended decision had been issued about one year earlier
12 preceding the final decision; and as I recall, the recom-
13 mended decision had proposed, or the decisions had provi-
14 sions to have retained the alternative butter and powder
15 or Minnesota-Wisconsin prices for those orders that had had
16 that alternative, those alternative provisions previously.

17 Q As announced in the press release, which was
18 given out the first day of the hearing, was there a change
19 to that recommended decision?

20 A Yes, the press release, as I recall it, called
21 for the elimination of the alternative method of pricing
22 and the use of the Minnesota-Wisconsin price series only.

23 Q Did you make any attempt to obtain a copy of that
24 decision?

25 A I --

1 MR. PALMER: I object at that point. I thought
2 the questions you asked up to now were to general background.
3 I think we are getting to the point you raised at the pre-
4 hearing conference of attempting to show some other kind
5 of injury or harm to you in the due process sense arising
6 out of the way in which you obtain data as to the 39 Order
7 decision.

8 As I stated earlier, and I state again, in review-
9 ing the petition that was filed here, I see nothing alleged
10 that would lead me to believe that this would be an issue
11 in this particular hearing, and I don't think it is appro-
12 priate to take testimony on it.

13 We certainly did not come here prepared to
14 argue that, and we had thought that that was ^{not} an issue in
15 this proceeding.

16 MR. TOOMEY: May I respond to that in this way,
17 your Honor? I ask your Honor to refer to Paragraphs 4(b)
18 and (c) of the petitions which I filed on behalf of my clients
19 in which we complained of and challenged the order on the
20 ground that it was issued as a part of a national project
21 to align national prices in all marketing orders without
22 reference to local conditions, and that it did not give
23 recognition to the differences in production and marketing
24 milk in the New York-New Jersey areas in violation of the
25 act.

1 As your Honor will note from reading the order
2 which we have appealed from here, one of the bases for the
3 argument is the need to align it with other orders. What
4 other order?

5 Orders issued the day this hearing began but
6 which we as counsel -- and I will get to my proffer in a
7 minute -- we who were present at that hearing were denied
8 to see the rationale which was directly relevant to the hear-
9 ing then and has become even more material now since the
10 rationale behind that order has been made the rationale
11 behind this order, and we are now aligning ourselves with
12 an order which we went to Washington without having a slight-
13 est idea that it even existed, and in fact knowing only that
14 there was a recommended decision contrary to the proposals
15 which were made for this hearing, only to find when we ar-
16 rived, by way of a press release, that the Department had
17 issued the day before, a final decision reversing itself and
18 yet our attempts to get it, to get the decision, to understand
19 the rationale behind it because it was directly material to
20 what we were in Washington for, were thwarted and we were
21 told we could have it after the hearing was over.

22 Therefore, that is also not only a rationale,
23 but a proffer of the testimony which I wish to get out through
24 Mr. Hammerman, who was present in the Washington hearing,
25 as was I in a representative capacity for handlers.

1 MR. PALMER: May I point to and ask that your
2 Honor compare Paragraph 3 of all of the petitions that
3 were filed here with Paragraph 4, Sections (b) and (c) that
4 Mr. Toomey would rely upon

5 If you review Paragraph 3 closely, you will see
6 a very narrative kind of allegation. All the things that
7 appear that took place at the hearing, and the consequences
8 of the things that took place at the hearing, are pretty
9 well factually -- I shouldn't use the word "factually,"
10 since we disagree with some of them -- but are narrated in
11 a very full and ample way. With that kind of full narrative,
12 Paragraph 4 which follows would appear to be related back
13 to the things that were specifically stated in numbered
14 paragraph 3, and there is just no way that one seeing the
15 petition would in any way imagine that this type of charge
16 is also part of the petition and its allegations.

17 MR. TOOMEY: Let me say further, your Honor, be-
18 cause I forgot to say something --

19 JUDGE CAMPBELL: All right.

20 MR. TOOMEY: -- that the subparagraphs of Paragraph
21 4 are identical to a complaint which I filed in the Federal
22 District Court in Washington under Civil Action No.
23 74-516, in which the Secretary of Agriculture was represented
24 there, as he is here, by Mr. Palmer.

25 Mr. Palmer is fully aware of the fact that that

1 point came up in both the preliminary restraining order
2 and in the preliminary injunction hearing, so that there is
3 no surprise.

4 MR. PALMER: There is a surprise to me because I
5 assume when I read a petition that it contains the allegations
6 that are being relied on, and if it doesn't contain allega-
7 tions that were raised before, I think they are abandoned.

8 At any rate, I think that I have said enough
9 about this. I think we are here on the basis of the plead-
10 ings before us.

11 JUDGE CAMPBELL: Let me ask one question. Refer-
12 ence has been made to Paragraph 3. How about the statement
13 there to the failure of the Department to respond to the
14 request that the material be made available at the hearing?

15 MR. PALMER: No, I believe that is the Minnesota-
16 Wisconsin price series. Exactly where on the page, sir?

17 MR. TOOMEY: I think they are all on the same
18 page.

19 JUDGE CAMPBELL: Page numbered 2 of the petition
20 which is Cuba Cheese Company's petition, would be about
21 the seventh line from the top.

22 PALMER
23 MR. TOOMEY: No, sir; if you read just before
24 it says denial of motions to require the Department to pro-
25 duce all of the data supporting the use of the Minnesota-
Wisconsin series as the basic pricing formula would permit

1 testing of the validity of the formula which information
2 is only in the Department's possession. The failure of the
3 Department to respond to the request that the material be
4 made available at the hearing. I think a reasonable read-
5 ing -- particularly since that all comes before a semi-colon,
6 that that particular section modifies the statement about Minne-
7 sota-Wisconsin price series.

8 MR. BRADLEY: Your Honor, our petition certainly
9 contains in its prayers for relief the allegations that ma-
10 terial information had been denied us, which I think is suf-
11 ficiently broad to encompass this proffer.

12 JUDGE CAMPBELL: Let's go off the record for a
13 moment and let me look at those petitions.

14 (Thereupon, there was a discussion off
15 the record.)

16 JUDGE CAMPBELL: Back on the record.

17 In a sense, I feel I have to agree with Mr. Palmer
18 on this one. Section 4(b) and (c) of the petition of Cuba
19 Cheese, as well as Section 4(f) of the Lehigh petition,
20 really doesn't give any indication that this type of evidence
21 dealing with the press release and 39 order decision is in-
22 volved in those particular sections.

23 I must confess I have no knowledge of the court
24 proceedings, and, therefore, I was unaware that it might
25 have been brought up in the court proceedings; but looking

1 at this petition, I see really no reference to --

2 MR. TOOMEY: Your Honor please, Paragraph 4 re
3 we say that it was illegal because it was issued as part
4 of the national project to align prices, we dealt here with
5 an order covering eight marketing areas.

6 But I am sure your Honor can take judicial notice
7 that there are many more than eight marketing orders throughout
8 the country; and it is perfectly -- it seems to me very
9 well covered when you say that there was a national project
10 to align prices, and that that project, and that approach
11 is illegal under the act, that the facts underneath it are
12 facts which relate to the fact that there is indeed a na-
13 tional project.

14 What are those facts? The 39 order decision,
15 supplemented by this decision.

16 JUDGE CAMPBELL: All right. I tell you what, I'm
17 going to allow the question. I must say this though: I
18 don't quite see it that specifically.

19 MR. PALMER: May I say one thing more before you
20 allow the question, sir?

21 I think the witness has testified that there was
22 an order, a decision rather, forthcoming from the hearings
23 on the 39 order.

24 We are not saying that that is an improper thing
25 to testify to. There was no objection made to that testimony.

1 What I have objected to, because as a result of
2 our pre-hearing conference I am anticipating, I can see
3 where it is going, the witness now wishes to make statements
4 about whether or not the Department did all that the peti-
5 tioners think they should have done to promptly apprise them
6 of the content of the 39 order marketing decision.

7 It is to that which I object, and that is not
8 encompassed within their allegation about that there is a
9 national project to align prices.

10 We are not saying that there was not an order as
11 to the 39 marketing order. What we are contending is that
12 it would be inappropriate to take evidence as to the way in
13 which they received notice of that order.

14 JUDGE CAMPBELL: Mr. Palmer, I am going to over-
15 rule your objection, and I am going to allow the question.
16 What I started to say was I don't see that so specifically
17 as you do, Mr. Toomey, in your petition.

18 Therefore, if respondent needs additional time
19 to prepare further to meet this particular allegation, I am
20 going to have to grant it. I will allow the question, and
21 then if Mr. Palmer needs additional time to respond, to
22 prepared allegations, I will have to grant that additional
23 time.

24 Objection overruled, Mr. Palmer.

25 BY MR. TOOMEY:

1 Q I believe my last question was: Were you able
2 to obtain a copy of that decision?

3 A No, we were not.

4 Q To whom were the inquiries addressed?

5 A To the people in the Department.

6 Q What were you advised?

7 A We were advised that the decision will be made
8 public the first week in March, which, of course, at the
9 time we didn't know how long the hearing would last; but
10 as it turned out, and if memory serves me right, the deci-
11 sion was published about a week after the hearings terminated.

12 Q Now, you have indicated that you yourself testi-
13 fied at that hearing.

14 A Yes, I did.

15 Q Am I correct, sir, that you were also there in a
16 representative capacity?

17 A Yes.

18 Q And your clients included in part petitioners
19 in this action?

20 A Yes.

21 Q And, as a representative of those people, was it
22 material for you to have a copy of the 39 order decision in
23 connection with this hearing?

24 A Yes, because I had appeared there for two purposes:
25 one, because we have several people for whom I appeared who

1 had a specific proposal to increase the baking allowance
2 under the butter/powder formula, and I testified further in
3 opposition to a number of proposals which aimed to use the
4 Minnesota-Wisconsin price exclusively for Class 2 pricing.

5 Q My question was as a representative of these
6 people, was it material to you to have a copy of the 39
7 order decision during the course of this hearing?

8 A Yes, it would have been very helpful, particularly
9 in cross-examining those proponents of exclusive use of
10 Minnesota-Wisconsin.

11 MR. TOOMEY: I have no other questions.

12 MR. PALMER: May I ask the court one thing? You
13 stated I might have time to meet this question about whether
14 or not the decision on the 39 marketing order was provided
15 to petitions^{re} as promptly as it should have been.

16 I don't know, offhand, what the facts were exactly
17 as to where the 39 market order decision was. I know there
18 was a press release, but I am vague now as to whether it
19 had been signed, whether it was awaiting publication in the
20 Federal Register office, whether it was on file with the
21 hearing clerk and was available.

22 I might ask Mr. Hammerman a question or two
23 about that, but would it be appropriate under those circum-
24 stances if I were to obtain this data back at Washington;
25 but rather than going through another hearing, present an

1 affidavit by whomever would know as to those details.

2 Just putting this out on the table for general
3 consideration.

4 MR. TOOMEY: May I suggest an intermediate step?
5 That is that this material be supplied by Mr. Palmer to
6 counsel; and then after they have had a chance to see it, it
7 may be possible to stipulate that that may go in without
8 the necessity of another hearing.

9 I would not like to commit myself without seeing
10 it.

11 MR. PALMER: All right. Fine. What I would like
12 to keep from going to another hearing if we don't have to.

13 CROSS-EXAMINATION

14 BY MR. PALMER:

15 Q Mr. Hammerman, let me ask you just on that--

16 JUDGE CAMPELL: Excuse me just a moment. Mr.
17 Bradley, is that acceptable to you?

18 MR. BRADLEY: Mr. Toomey's suggestion, yes.

19 JUDGE CAMPELL: All right.

20 Q Mr. Hammerman, let me ask you something. Your
21 memory is much superior to mine. Do you recall if the de-
22 cision had actually been issued at that time when the press
23 release came out?

24 A The press release which was dated the day prior
25 to our receiving it said that the decision had been made.

1 Q In other words, the Secretary had signed the deci-
2 sion, but it hadn't been published in the Federal Register?

3 A Exactly, I don't recall specifically whether it
4 talked about a signature of the Secretary, but it was a
5 release of the Department indicating that the decision had
6 been made.

7 I don't recall that the Secretary -- any reference
8 was made to the Secretary's signature,

9 Q It might have been on his desk awaiting signa-
10 ture or something of that nature?

11 A Possibly.

12 Q You say you were not provided a copy. First,
13 then it means you weren't physically given a copy of the
14 decision. Were you told where you could see a copy of it?

15 A Yes. Actually, to avoid my leaving the hearing
16 room, I asked one of the people who was associated with me,
17 Mr. Harvey Miller, to try to get a copy from the representa-
18 tives of the Department, either those who were present in
19 the hearing room, or since this hearing was held in the
20 South Building of the Department of Agriculture, he could
21 have gone in -- and I am not certain whether he did go
22 into the offices of the officials of the Department, but he
23 apparently made the request, and he told me he had made the
24 request of several people from the Department, and he could
25 not get the decision.

1 Q I understand you are saying he could not physically
2 obtain a copy; but was he denied, well, here it is, but we
3 can't physically reproduce it at this time?

4 A No, he asked if he could see it and was told he
5 can't, that it will be available the first week in March.

6 Q Then we will leave that alone until I get some
7 data on it.

8 You gave the pounds of milk which the New York
9 petitioners -- let's call them the New York petitioners --
10 in this case, handled in the months of October through
11 April. And I noticed that there was quite an increase
12 between October and a little bit more in November, then into
13 December, and by April, they were handling quite a bit more

14 Did you also happen to have with you the figure
15 for May of 1974?

16 A I don't have it in this compilation. No, I don't.

17 Q Do you know if it was as much as it was in April?

18 A It probably was as much, and I judge that by the
19 fact that, as I had previously testified, I believe the
20 seasonal variation among the people we are representing here
21 is about in the same ratio as the season variation in the
22 entire pool of order No. 2 is.

23 Q Let me ask you this question, if I may. The
24 year preceding 1973, when the butter/powder formula was
25 less than the Minnesot-Wisconsin, which I think is a matter
of record in this case, that from January through September

of 1973, the Order 2 volume in Class 2 was 358.4 million pounds, and in January of 1974 it was 389.6 million pounds.

A That is correct.

Q How your handler volume handling at that time in those previous months as they started to handle it October or November or more, or to put that.

A Well, I think the best answer to the question to you is I don't know, but inasmuch as I did offer my opinion that the month variation is about the same with these particular handlers as it is with the pool, I can give you -- and I have before me the Class 2 volume in the pool, and I venture to say that our variation month to month would be in about the same ratio we find it here for the pool as a whole.

Q Was the Order 2 pool handling as much milk in January of 1973 for Class 2 as it was in January of 1974?

A January of 1973, the Class 2 volume in Order 2 was 358.4 pounds, -- million pounds, that is. In January of 1974 it was 389.6 million pounds.

In answer to your question, I would say it handled a greater quantity in January of 1973.

Q What about orders -- I am just going to jump around a little bit. I guess that wouldn't be representative, it wouldn't give us a fair comparison, February of 1973.

1 A February 1973, the Class 2 pool volume of
2 Order 2 was 337.3 million; for '74 it was 316.4 million.

3 Q Of course, you did testify at the rule-making
4 hearing, didn't you, Mr. Hammerman?

5 A Yes.

6 Q In fact -- again, I am probably anticipating here--
7 but you testified as to the appropriate amount of the make
8 allowance, did you not, in respect to New York as compared
9 to Minnesota-Wisconsin?

10 A No -- well, actually, it wasn't for that purpose.
11 Our proposal, and I have forgotten the number of it, was to
12 increase the making allowance by something like 24 cents,
13 and it was based on the increased costs between the time
14 that it was first put in the order and that time.

15 Q At any rate, what I am trying to get to is that
16 you did have opportunity, and you did testify as to the appro-
17 priate amount of make allowance under the Order 2?

18 A Yes.

19 Q And you did?

20 A Yes.

21 Q And you also brought out the question of farm
22 point pricing and so forth too, in your testimony, didn't
23 you?

24 A Yes, sir.

25 MR. PALMER: Thank you, sir, nothing further.

1 JUDGE CAMPBELL: Any redirect?

2 MR. TOOMEY: No, sir.

3 MR. BRADLEY: I have no questions.

4 JUDGE CAMPBELL: Thank you, sir, you are excused,
5 Mr. Hammerman.

6 (Thereupon, the witness was excused and retired
7 from the witness stand and resumed his seat
8 in the hearing room.)

9 JUDGE CAMPBELL: Let's take about a five-minute
10 recess.

11 (Thereupon, there was a short recess.)

12 JUDGE CAMPBELL: Back on the record.

13 MR. TOOMEY: Your Honor please, it has been brought
14 to my attention that we have not moved into evidence Respond-
15 ent's Exhibit 1, and I do so at this time.

16 JUDGE CAMPBELL: Is there an objection?

17 MR. PALMER: Objection. Yes. Pardon me, off
18 the record, please.

19 JUDGE CAMPBELL: All right, off the record.

20 (Thereupon, there was a discussion off the
21 record.)

22 JUDGE CAMPBELL: Back on the record.

23 Earlier I was asked to mark for identification a
24 letter dated June 18, 1974, Exxon Exh. 1. I designated the
25 exhibit Respondent's Exhibit 1. Actually, it should have

1 been designated Petitioner's Exhibit 1, and Mr. Toomey has
2 offered Petitioner's Exhibit 1.

3 I take it, L. Palmer, you have objected.

4 MR. PALMER: I objected for the reasons previously
5 stated.

6 JUDGE CAMPBELL: And the objection is overruled.
7 Petitioner's Exhibit 1 is received in evidence and becomes
8 part of the record.

9 (Whereupon, the document previously marked
10 Petitioner's Exhibit No. 1 for identification
11 was received into evidence.)

12 MR. TOOMEY: Mr. Martin Schanback, please.

13 Whereupon,

14 MARTIN SCHANBACK

15 was called as a witness, and having been duly sworn by the
16 Administrative Law Judge, assumed the witness stand, and,
17 upon examination testified as follows:

18 DIRECT EXAMINATION

19 BY MR. TOOMEY:

20 Q Mr. Schanback, would you state for the record
21 your name and address and business affiliation.

22 A Martin Schanback, S-c-h-a-n-b-a-c-k. Address
23 is 4900 Masspath Avenue, Queens, New York. I am president
24 of Friendship Dairies, Inc. of Friendship, New York.

25 Q And Friendship Dairies is one of the petitioners

in this proceeding, is that correct, sir?

A That is correct.

Q For what period have you been engaged in the dairy industry?

A I have been engaged in and associated with the dairy industry for 27 years.

Q In what capacities with Friendship Dairies, from production responsibilities to the presidency.

Q Can you state for the record the type of products which Friendship Dairies handles?

Q The prime line of products are soft cheeses, including cottage cheese. We also make a line of buttermilk, sour cream, churned butter, and various and sundry other soft products, which include cheeses that are made with cultures rather --

Q Have you been active in any trade associations or organizations?

A Yes. I have most recently been associated with the North Atlantic Milk Dealers Association -- Processors Association, which is an embryonic organization of milk processors, which is now -- just now, coming into being officially.

Q In the 27 years that you have been active in the dairy industry with Friendship, have you gained familiarity with the market factors with respect to other types of dairy

1 products?

2 A Yes, I have, both through direct association in
3 selling and in purchasing from other milk organizations and
4 in association with others who are engaged in other facets
5 in other field in the milk-processing industry.

6 Q In the course of your experience, have you become
7 familiar and knowledgeable about the Federal order system,
8 and in particular the provisions of Order No. 2?

9 A Yes, I have been associated or had occasion to be
10 associated with Order No. 2 for approximately 20 years.

11 Q Are you aware, sir, of the Minnesota-Wisconsin
12 series?

13 A Yes, I am.

14 Q Which is what, sir?

15 A Minnesota-Wisconsin series is a pricing series based
16 on a set of facts to which we in the East are not privy.
17 It is a set of facts allegedly to represent the average
18 manufacturing prices paid by a certain series of plants in
19 the Midwest located in the States of Minnesota and Wisconsin.

20 I am not at all familiar, nor have I been successful
21 in getting information leading to either the names, the
22 methods of gathering the information, or for that matter any
23 other practical method of determining just exactly the re-
24 lationship of the so-called Minnesota-Wisconsin prices to
25 the value attached to the material that they represent.

Q Are you familiar, sir, with the opinion in the industry -- the opinion of handlers -- respecting the Minnesota-Wisconsin series?

A Yes, I am. It is generally believed that the prices reported to be paid by those plants--

MR. PALMER: I object to that. Pardon me. I am sorry. The way the question was asked I thought it was going to be two questions. I thought the first question was going to be are you familiar with it; and when the next question was phrased, I would object, but the witness is going on to state what his understanding of the general opinion in the industry is. I do wish to object to that type of testimony, and I would move that it be stricken because again we are going far beyond what would be appropriate to the issue in this case as to whether or not ^{there was} the substantial ^{of record} record of evidence ^{was} taken.

JUDGE CAMPBELL: I believe you are correct, Mr. Palmer. I would sustain the objection.

MR. TOOMEY: If your Honor please, I might just speak just a moment. One of the serious questions which is raised by this proceeding is that fact that a price series as to which little, if anything, is known was used as the -- let me withdraw that.

One of the issues raised in this proceeding is that the price series was established as the sole basis for

1225a

1 pricing Class 2 milk under this order, the details of which
2 little, if anything, is known.

3 Various motions were made, including Mr. Hammer-
4 man on behalf of the immediate petitioners, and our office
5 with respect to the productions of information as to exactly
6 what the Minnesota-Wisconsin series was, and this material
7 was not produced.

8 When you have a hearing called as this one was,
9 and the issue is, is there or is there not an emergency,
10 the answer to that is yes, there is an emergency or no, there
11 is not.

12 The answer is since there is an emergency, we
13 are going to do this about it. It is the "this" about it
14 that is the subject of this hearing, and the "this" about it
15 is that the Minnesota-Wisconsin series was decreed to be the
16 basis and the sole basis for pricing the milk, and the rea-
17 sons why the motions were made is that it was not and is
18 not accepted by handlers that this is a valid basis for
19 pricing milk, at least in the Order 2 and Order 4 areas.

20 Regardless -- it may well be the proper means of
21 pricing milk somewhere else, but it is not, it is not believed
22 to be in this area.

23 I am leading up, if you will, to an explanation
24 by Mr. Schanback of the reasons why particularly with respect
25 to competitive effects in the New York area and the suspicion,

1 as we have tried to make clear our belief is that this order
2 is illegal because of the lack of evidentiary base for it.

3 We believe that if the Minnesota-Wisconsin series
4 is to be utilized, there should be a hearing at which it is
5 justified. It was not done so in this case.

6 We are trying to show that there is a reason why
7 we feel the way we do and that it is just not objecting for
8 objecting's sake.

9 This is the reason for this testimony.

10 MR. PALMER: They made their position very clear
11 at the rule-making hearing. They made it very clear in their
12 brief. They made it very clear in motions that have been
13 made in this rule-making proceeding prior to today, and
14 to now expand upon it is just to go beyond.

15 They had their opportunity, and they used their
16 opportunity to state their reasons why they felt the Minne-
17 sota-Wisconsin price data should not be used for a particular
18 set of reasons.

19 JUDGE CAMPBELL: I still stay with my ruling in
20 sustaining the objection. I think, as you have stated, my
21 purpose here is to determine whether there was sufficient
22 justification in that record.

23 I have to look at that record alone. I don't think
24 I can look beyond that record or at something the Secretary
25 had no opportunity to look at, and, therefore, I believe I

1 am going to sustain the objection.

2 MR. PALMER: Would that also include striking
3 the testimony that was given because, as I say, I had to make
4 the objection midway through testimony. I didn't realize
5 the question was going to lead to actual statements.

6 JUDGE CAMPBELL: Can you go back to the response
7 and read it, please.

8 (The last answer of the witness was read.)

9 JUDGE CAMPBELL: Mr. Palmer, you got in there
10 pretty quick.

11 Let's just leave it in there.

12 MR. TOOMEY: Just so that I am clear: Your
13 Honor has ruled that the nature of these objections and
14 suspicions were or should have been stated at the hearing
15 itself based upon -- rather than at this time?

16 JUDGE CAMPBELL: Yes.

17 MR. TOOMEY: Very well.

18 BY MR. TOOMEY:

19 Q Have there been any events, Mr. Schauback, since
20 the hearing which have caused suspicion with regard to the
21 Minnesota-Wisconsin series?

22 MR. PALMER: Again I object. What has happened
23 since the hearing is not a proper subject matter of this
24 proceeding.

25 MR. TOOMEY: May I make an offer of proof in

1 that event, your Honor?

2 JUDGE CAMPBELL: Let me sustain the objection
3 first. I think that I agree with Mr. Palmer.

4 All right, go ahead and make your offer of proof.

5 MR. TOOMEY: Your Honor please, I should like to
6 offer into evidence in support of this the deposition of
7 Dwight L. Morris which was taken on Friday, May 31, 1974,
8 in, and I will spell it because I don't know how to pronounce
9 it -- S-i-l-o-a-m Springs, Arkansas.

10 JUDGE CAMPBELL: What is the date on that?

11 MR. TOOMEY: May 31, 1974, in the case of the
12 United States versus Associated Milk Producers, Incorporated,
13 which is Docket No. 74-CV80-W-1, pending in the United States
14 District Court for the Western District of Missouri, Western
15 Division, known generally as the Midwest Milk Monopoliza-
16 tion litigation, which is JPHL Docket No. 83, the initials
17 standing for the judicial panel on multi-district litigation.

18 There are three associated cases which are anti-
19 trust cases, in which AMPI is a defendant. Testimony from
20 Mr. Morris who is the retired secretary of the AMPI and was
21 vice president of MPI before that, at Pages 94 through 100
22 of the deposition transcript testified that events occurred
23 in the fall of 1970 and the spring of 1971 in which the wit-
24 ness testified to the artificial rigging of the Minnesota-
25 Wisconsin price, the device utilized being the transfer of

1 over-order premium monies from the South and Northwest to
2 Minnesota and Wisconsin, the money then being paid out to
3 Minnesota and Wisconsin cheese plants, to AMPI members, and
4 those prices then being reported to the Department of Agriculture to form the basis of the Minnesota-Wisconsin price,
5 an estimate being made in the course of that, that, the re-
6 sult of the nickel movement of money on this basis -- per
7 hundred weight, of course -- resulted in hundreds of
8 millions of dollars paid to farmers across the spring through
9 the operation of the Minnesota-Wisconsin series.

11 This is a certified copy of the deposition, 129
12 pages in length, together with three volumes of exhibits,
13 to which is attached the certification of the court reporter
14 who took the testimony, and because it is the first real
15 evidence that anybody in the handler business has had to
16 justify the suspicions which have been held of the Minnesota-
17 Wisconsin schedule, we offer this into evidence as both
18 going to the merits of the designation or decree that the
19 Minnesota-Wisconsin series should be the sole basis for
20 payment for manufacturing Class 2 milk under Order 3.

21 May I just offer that into evidence in accordance
22 with that proffer I will offer it to the court as evidence
23 a copy of that transcript?

24 MR. PALMER: I object for the reasons stated, and
25 may I just say this: you won't agree with me, but I want

1 the record to be clear -- the deposition as stated by Mr.
2 Toomey was taken May 31, 1974.

3 It is subsequent to the rule-making hearing. It
4 is subsequent to the partial decision. It is subsequent
5 to the order that was issued based upon the partial decision.

6 It is also subsequent to the last time that any
7 request was made by petitioners for a re-opening of the
8 hearing. It is the type data that if it should be considered
9 at all, it should be considered by the Secretary in a rule-
10 making proceeding, not the 15(a) proceeding.

11 A request would be needed for a rule-making pro-
12 ceeding, which is not being made.

13 Secondly, subsequent to that, or additional to
14 that, I would also like to point out that the attempt was
15 made here to bring this kind of data in through a witness
16 alluding to another man's deposition.

17 If it had been permitted in, we would have had
18 no opportunity to directly examine the witness. We don't
19 know what the witness' situation was in terms of his motiva-
20 tion for the statement.

21 We don't know if he actually was correct when,
22 if he did, make statements about attempting to manipulate
23 prices, whether he was successful or not. There are so
24 many problems inherent in this that I wanted the record to
25 reflect that this wasn't just a technical objection we are

1 making.

2 There are many serious ~~issues~~, serious problems
3 with this kind of evidence being received in ^{an adjudicatory} ~~rule-making~~
4 hearing such as this that would never be able to fully cure.

5 For those reasons, we reiterate our objection.

6 MR. BRADLEY: Your Honor, I would like to join
7 in the proffer made by Mr. Toomey and add to it that Lehigh
8 Valley was unaware of this deposition until a news article
9 appeared in both the Washington Post and the Philadelphia In-
10 quirer, and I presume other newspapers, on June 6, 1974.

11 But that this information actually substantiates
12 and supports the suspicions which Lehigh had and which its
13 witnesses tried to bring out in the rule-making hearing in
14 February, and for which we consistently asked for information
15 and sources of information within the Department, which we
16 feel sure they must have had.

17 The Department of Agriculture is itself a party
18 to these anti-trust proceedings that Mr. Toomey has cited.
19 It has had ample opportunity to cross-examine the witness in
20 the deposition, and certainly the righthand of the Department
21 should know what the lefthand is doing.

22 MR. PALMER: Let me make it clear on that too.
23 Mr. Bradley has stated a number of times that they have asked
24 for information and the information was not forthcoming.

25 We have ^{been} asked the question, the question was do

1 you have knowledge of the financing of the standby pools,
2 and the answer has been given, no, we do not.

3 Let's get this cast in the proper way. It is not
4 that the Department is trying to keep it confidential. We
5 thought that we stated quite bluntly that the Department
6 doesn't have this data that is being sought, and that is why
7 I say if new information or new data has arisen in the form
8 of a deposition of a witness in an anti-trust proceeding,
9 then that kind of data should properly give rise to another
10 hearing by the Secretary at rule-making in terms of whether
11 or not the Minnesota-Wisconsin price series is an appropriate
12 price series to use, and a request should be made for rule-
13 making. This is not the proper forum.

14 MR. BRADLEY: Your Honor, we have repeatedly,
15 at every stage, and every paper we filed both orally and
16 in writing asked for a hearing.

17 JUDGE CAMPBELL: Subsequent to May?

18 MR. BRADLEY: Prior.

19 JUDGE CAMPBELL: But subsequent to May?

20 MR. BRADLEY: Through learning about this on
21 June 6th, nothing, because by that time we had filed our 15(a),
22 and a hearing was about to be scheduled, and it was scheduled
23 for today.

24 We thought we would have an opportunity to do
25 that here today. I might say, broadly speaking, that the

1 Department of Agriculture -- it is incomprehensible to me
2 that the Department of Agriculture would have this informa-
3 tion now before it, and spread all over the public papers
4 of this country what's been going on in regard to pricing
5 could still be so reticent.

6 MR. TOONEY: May I make a further observation,
7 if I may?

8 JUDGE CAMPBELL: Yes.

9 MR. TOONEY: I must concede that I do not see
10 as the answer to an illegal order, the answer being have
11 another hearing, ask for another rule-making procedure, to
12 rectify what we have already decided to do.

13 The answer is, it seems to me, as a matter of
14 logic, set aside what we have done, go back, and do it again,
15 and take and examine what it is what we are doing.

16 It is not to say, well, it is true that all of
17 this stuff is around, but we are not going to pay any
18 attention, and this is going to be the law and this is going
19 to be the regulation, unless you ask for a hearing, which
20 we may or may not grant.

21 MR. PALMER: Inasmuch as we are not ex parte, we
22 all are here, and we are talking about the case in a way,
23 and your Honor is going to be asked to decide it very soon
24 because I understand the briefing date is a early one, I
25 might just point out that the condition of the orders prior

the MW applied underneath
to their amendment was that on Class 1, ~~III~~, underneath the
particular orders that were involved -- there were 2, 4, and
the others of the 8 milk orders -- all Class 2 milk --
under some of them it is Class II milk, and
~~and, somewhere it is class 2 milk, and somewhere they had~~
under some they had
a 3-class system -- all of them price milk at Minnesota-Wis-
consin or butter/powder, whichever was lower.

As a question of Mr. Hammerman pointed out a
little earlier, during the year January of 1973, it was the
butter/powder formula which pertained^{ed}, I believe, during
the months of January through September.

Quite the contrary, the Minnesota-Wisconsin
price pertained during the months of January through Septem-
ber of 1973, and the butter/powder formula only came into
being or came to be the pricing factor in the last three
months of that year.

The situation then was, even without the order~~d~~
amendment, the Minnesota-Wisconsin price series would per-
tain at certain months to milk used to manufacture Class 2
products.

As a matter of fact, even if the order had not
been amended, it probably is shown that there is a divergence
between butter/powder and Minnesota-Wisconsin prices as
unchanged
~~changed.~~

But what they are asking in effect, when they
state that we should go back to what we had before, is to say

1 we should go back and utilize a butter/powder formula in
2 those months when it is lower, but utilize the Minnesota-
3 Wisconsin price series in those months when those handlers
4 can obtain milk at a lower price.

5 It just doesn't really fit in with the statements
6 they are making about Minnesota-Wisconsin price series being
7 wholly questionable because it may be subject to effects
8 or attempts at manipulation by various authorities.

9 At any rate, there is no particular -- I shouldn't
10 say particular -- there is nothing before the Secretary at
11 present requesting a new rule-making hearing, and all of
12 this data that they bring in is subsequent to the last re-
13 quest for a rule-making hearing.

14 JUDGE CAMPBELL: All right, gentlemen--

15 MR. FERGUSON: I would like to suggest that during
16 the whole process of the hearings on the rule-making, the
17 filing of briefs, et cetera, et cetera, I wish on more than
18 one occasion, and we will introduce a witness to testify to
19 that, on every occasion where we had any contact with any
20 Department of Agriculture official requested a re-opening
21 of the hearing or time to develop evidence during the pro-
22 gress of the hearing relative to the information which was
23 being sought.

24 This was the ongoing situation. There was no
25 opportunity for us to really have made proposals. It is

1 quite likely -- it is quite possible that we could have
2 made proposals had our request been granted but this is
3 dependent upon the grant of our original request, which was
4 also given to the court. They ordered them to re-open the
5 hearing. Don't compound the injury by denying the hearing
6 which was necessary to establish the information which is the
7 ingredient of rule-making.

8 MR. BRADLEY: Mr. Palmer has just stated on the
9 record here, he said they didn't have the information, but
10 it is certainly available.

11 JUDGE CAMPBELL: Gentlemen, let me say this. I
12 appreciate your comments, and I certainly can see all
13 points of view expressed. However, my function under
14 Section 8(c)13 of the Act is to determine whether or not the
15 Secretary's decision is or is not in accordance with the
16 law.

17 In this connection I will thoroughly review the
18 record, and I will hopefully determine, rightly or wrongly,
19 whether or not there was sufficient justification in that
20 record to support or not support the Secretary.

21 I cannot look at matters which were not before
22 the Secretary of Agriculture. The Secretary is charged,
23 pursuant to Section 8(c)3, and 4 of the Act with promulgating
24 and issuing orders and amendments to orders, and my function
25 is under Section 8(c)13 to determine whether or not there

1 is sufficient evidence in the record to support his find-
2 ing.

3 I cannot take this evidence which you have offered,
4 Mr. Toomey. I sustain the objection.

5 With respect to your offer of proof, I think
6 your statement is an adequate proffer of the matter. I
7 see no need to take the actual deposition and the volume
8 of pages that go with it.

9 I think you have described it adequately as far
10 as an offer of proof is concerned.

11 MR. TOOMEY: Very well. May I just have
12 one second, your Honor?

13 JUDGE CAMPBELL: Yes, you may.

14 BY MR. TOOMEY:

15 Q We are going to change the subject. Mr. Schan-
16 back, as a consequence of the order which is here the subject
17 of attack, can you tell us what has occurred to the volume
18 of sales in the Order 2 area in milk products?

19 A In the specific areas which our company endeavors
20 to perform a manufacturing function, sales are off between
21 12 and 15 per cent.

22 In other areas which are familiar to me, due
23 to the selling of raw materials such as ice cream, I have
24 been informed by potential customers that their sales are
25 off up to 25 per cent during the first half of this year.

1 At the present time, as the weather moderates
2 and goes towards the normal ice cream season, sales are
3 apparently off closer to the 15 per cent that cheese sales
4 are off.

5 In other areas such as fluid milk --

6 MR. PALMER: May I ask where we are going?

7 MR. TOOMEY: We are almost finished. As to the
8 harm which has been sustained by private petitioners as a
9 result of the order.

10 MR. PALMER: Your Honor, I have a great deal of
11 difficulty with that. In the litigation that we have in
12 the District Court, in which the petitioners both sought
13 relief on the basis of irreparable injury and harm, the
14 Court dismissed their request for preliminary injunction,
15 subject to our stipulation that the Market Administrators for
16 both orders 2 and 4 would prepare each month an exact com-
17 putation for each of the handlers involved as to what effects
18 in terms of dollars and cents the amendment of these orders
19 had upon them.

20 To date there hasn't been one penny difference.

21 As it turns out, the Minnesota-Wisconsin price
22 series as it applies under the amendment, is no different
23 than it would have applied if the order hadn't been amended,
24 so that ^{there} has been no damage, and I just don't see where we
25 are going.

1 MR. TOOMEY: If you -- No. 1, the testimony
2 which is going to be given is not the kind of dollar differential
3 damage with which we were dealing in the Washington case,
4 because my next question was going to be how does he relate
5 this to the order that went in.

6 MR. PALMER: The only thing we are ever concerned
7 with in cases in respect to handlers is money.

8 MR. TOOMEY: You forget the price elasticity as
9 to this type of product, and there have been substantial
10 decreases in sales. I will leave it to his Honor.

11 JUDGE CAMPBELL: I am going to overrule your
12 objection, and I will allow the witness to testify.

13 BY MR. TOOMEY:

14 Q In what respect, if at all, Mr. Schanback, is
15 this attributable to the order that is now the subject of
16 this attack?

17 A We in the industry feel that there is a great
18 deal of price elasticity in the sale of our products. As
19 reasonable business people, we assume, as did many of the
20 experts in the field, including the Secretary, that the
21 change in order provisions to price solely on the basis of
22 the Minnesota-Wisconsin series would have resulted in a sub-
23 stantial increase during the months of April through July
24 of 1974.

25 We estimated that for the month of April, this

1 would have caused the price on Class 2 milk to rise
2 approximately \$1.15 a hundred weight.

3 In anticipation of this rise in price, we boosted
4 the price of cottage cheese 6 cents a pound. As soon as
5 the price increase reached the consumer level, where it
6 was reflected in an approximately ten cents a pound increase
7 to the consumer, we noticed a drastic decrease in sales.

8 This high-price level existed for six weeks until
9 the middle of May, when it became apparent to us that the
10 April price was not going to exist at the high level, that
11 in all likelihood the May price also would not be in the
12 neighborhood of what we had been figuring, at which point
13 we reduced prices.

14 Unfortunately, the result of the reduction in
15 price was not sufficient to recoup the level of sales that
16 we had anticipated in previous years. To this date, our
17 sales level has not approached that of previous years, even
18 though we have reduced prices a second time.

19 MR. TOOMEY: Very well. I have no further ques-
20 tions, your Honor.

21 JUDGE CAMPBELL: Mr. Palmer.

22 CROSS-EXAMINATION

23 BY MR. PALMER:

24 Q I have a very strong recollection, Mr. Schanback,
25 that in the litigation before the District Court in the com-

1 plaint filed on your behalf by Mr. Toomey, and which was
2 supported by affidavits which may have included an affidavit
3 by yourself, there was a definite allegation that because of
4 the existence of -- was it -- the cost of living council
5 provisions, that to the extent that your product cost would
6 increase as a result of this amendment of the marketing
7 order, you would not be able to pass on this increased cost
8 to consumers.

9 Do you recall that, sir?

10 A Not specifically.

11 MR. TOOMEY: If I may, Mr. Palmer, I don't think
12 the "because" is right.

13 MR. PALMER: Let me see if I can straighten my--
14 self out here. Let me just look.

15 MR. TOOMEY: There was an allegation that we would
16 not be able to pass it on to the consumers, but rather, I
17 believe it was due to price resistance rather than to the --

18 MR. PALMER: Let me see if I can find it. Un-
19 fortunately I didn't bring it with me. There is something
20 you didn't bring with you. But I didn't bring with me the
21 complaint that was filed in that case.

22 I do happen to have with me a copy of a memorandum
23 of law which was submitted by your counsel in support of
24 your motion for preliminary injunction. Page 26.

25 MR. TOOMEY: Where are you?

1 MR. PALMER: Page 26 of your memorandum of law
2 supporting the motion for preliminary injunction.

3 MR. TOOMEY: Bear with me one second.

4 (After a pause.) I have it.

5 MR. PALMER: There is a statement in there about
6 the fact that if you win this action, the 15(a), ultimate
7 success will be a pyrrhic victory,--That is not a term that
8 is usual to me,-- if the order is not stayed now.

9 Under the order, all milk which has been purchased
10 since April 3 and all milk which will be purchased between
11 now and July 31 must be paid for at the new and substantially
12 higher prices established by the order.

13 It then refers to an affidavit by Mr. Hammerman
14 in which he estimated what those increased costs would be.

15 Then it states:

16 "On the short run, plaintiff will have to absorb
17 these increased costs. Contracts and trade practices
18 with purchasers of dairy products generally provide
19 that prices cannot be changed without a period of
20 advance notice. On the longer run, whether plaintiff
21 will be able to pass on increased raw product costs will
22 depend upon whether the ultimate consumer is willing
23 to pay the higher price for the product."

24 I give you that as background because it was my
25 understanding as a result of that complaint that one of the

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1 major things that you and your fellow handlers in Order No.
2 2 were complaining about was that if there were increased
3 costs as a result of the amendment of Order No. 2,
4 that you would not be able to pass on these costs to the
5 consumer; is that correct?

6 THE WITNESS: That is correct.

7 BY MR. PALMER:

8 Q And now, I understand that you did boost the price
9 of cottage cheese 6 cents a hundred weight; is that cor-
10 rect?

11 A That is correct. However, the two are not in-
12 consistent one with the next. As I have previously testified,
13 the result of the boost of six cents a pound on the price
14 of cottage cheese caused a definite slackening in the consumer
15 demand for these products, and as all manufacturers know,
16 plant volume is all-important in total profit.

17 Q I think where we may differ is this: my under-
18 standing was, and it may be a misunderstanding, but my
19 thought was that you were saying in your complaint that for
20 every hundred pounds of milk that you would purchase, you
21 would have to pay more for it than you anticipated as a result
22 of the amendment of the order.

23 A Right.

24 Q And that you could not pass on that cost per the
25 hundred pounds that you bought to the consumer in terms of

1 the product, ^{sold} ~~sell~~ to the consumer made from the pounds pur-
2 chased; but what you are saying is that although you were
3 able to boost the price of your cottage cheese six cents
4 a hundred weight, the ultimate amount of cottage cheese
5 that was purchased then went down?

6 A Mr. Palmer, any manufacturing plant operates on
7 the differential between the cost of the material he buys,
8 and the selling price of the material he sells. If the
9 price of this one raw material taken by itself went up a
10 dollars and twenty cents a hundred, we should have raised
11 price in the neighborhood of eight cents a pound.

12 But even if the two figure would not show a two
13 cent disparity, and even if we were to raise penny for penny
14 on our selling price, the loss of sales would in and of it-
15 self be a hollow victory.

16 Q I understand.

17 A In addition to that, every pound or every hundred
18 pounds of milk lost in the plant to various manufacturing
19 accidents, normal plant losses, and the like, would have
20 increased in cost.

21 Our total profit -- the total difference between
22 our buying price and our selling price -- would most certainly
23 have been decreased.

24 Q I understand. Now, let me ask another point.

25 In your testimony about price elasticity there, what you were

1 saying was that to the extent that the order would increase
2 prices, the product has only so much price elasticity and
3 accordingly, your price-sales elasticity would decrease
4 also?

5 A Yes, that is right.

6 Q Would decrease as the price goes up?

7 A Would decrease as the price goes up.

8 Q Your plant is under Order No. 2, construed as
9 being a designated pool plant, is it not?

10 A I believe these are the words.

11 Q What shipping requirements -- strike that.

12 Let me go back. How long have you been a designated
13 pool plant under Order No. 2?

14 A Approximately fifteen years.

15 Q Doesn't that place you under sort of a sort of
16 grandfather clause under Order No. 2 which relieves you from
17 shipping requirements as a pool plant?

18 A I am not familiar with the term "grandfather
19 clause." However I am aware of the fact that we are not
20 required to ship a prescribed or pre-prescribed percentage
21 of milk in order to remain qualified.

22 Q Accordingly, you are not required to purchase
23 producer milk that is regulated by Order 2; is that correct,
24 sir?

25 A IN theory that might be correct; and as an actual

1 fact, that is not so.

2 Q What I am saying is that as far as the law is
3 concerned -- I am talking about the Federal law as imple-
4 mented by the marketing order -- there is nothing in that
5 order that prescribes or requires that you purchase producer
6 milk regulated by Order No. 27

7 A If you limit it to the prescribed Federal law,
8 the answer would be yes.

9 Q And in fact you -- (After a pause) -- am I
10 correct -- when we get into Order No. 2, we are dealing with
11 what everyone refers to as unique orders.

12 It is very complicated. I am getting this third
13 and fourth hand, but am I correct that you can buy producer
14 milk under Order 2, pay for it, -- of course, when you buy
15 producer milk, you are required to pay the Order 2 price --
16 but you can buy as much of that as you want and also buy as
17 much milk that is non-producer milk, and you will only be
18 charged the Order 2 price on the amount of producer milk
19 that you purchase because you are a designated handler, free
20 of shipping requirements?

21 A I am sorry. I don't quite follow the question.

22 Q Because you are a designated pool plant, which
23 does not have shipping requirements which would be true of
24 other pool plants, you can buy producer milk --

25 MR. TOONEY: Excuse me. Do you mean other pool

plants under Order 2 or pool plants under other orders?

MR. PALMER: It would be other pool plants under Order 2.

MR. TOWNEY: I see.

Q You can buy producer milk, and you can also buy milk from non-regulated sources, and it doesn't matter how much you buy of one or how much you buy of the other, you will only be required to pay Order 2 prices on the Order 2 producer milk that you purchased, and at the same time, however, you do retain your pool plant status?

A If I understand your question, it is under the regulations of Order 2 are we permitted to buy milk from non-Order 2 sources; and if we are, are we required to pay to Order 2 only for the Order 2 producer milk. The answer to that is yes.

Q Thank you.

Would you know which of your co-petitioners from Order 2 are in the same circumstances as yourself?

MR. TOWNEY: Excuse me, your Honor. May I ask a question for clarification? That circumstances is he talking about?

MR. PALMER: The very last answer that he gave, I don't know if he knows or doesn't know.

Q Do you know to which of the other co-petitioners, if any, that would also be applied to?

1 Aq Mr. Palmer, I think the answer would be to any
2 and all who are pool plants under Order 2, the same rules
3 and regulations would apply. This is not necessarily
4 limited to my co-petitioners, but this is general to any
5 Order 2 plant.

6 Q It would apply to all the other petitioners?

7 A I would believe so.

8 MR. PALMER: Nothing further.

9 JUDGE CAMPBELL: Any redirect?

10 MR. TOOMEY: Yes, I have one question.

11 REDIRECT EXAMINATION

12 BY MR. TOOMEY:

13 Q You were asked certain questions as respects the
14 strict wording of the order. As a practical matter, can
15 you tell us what is done with respect to the purchasing of
16 this milk?

17 A As a practical matter, a substantial part, if
18 not 100 per cent of the supply to any Order 2 plant, will
19 be Order 2 regulated milk.

20 There are several very practical reasons for
21 this. There are many health authorities requirements that
22 govern the shipment of milk into, out of plant, and most any
23 other Order 2 plant, among which is a U.S. Public Health re-
24 gulating.

25 Most other non-regulated milk would be of the so-

called manufacturing grade and would be either non fit
quality-wise to be public rated, and to the best of my knowl-
edge at the present time, it would be also of extremely
limited volume, far below sufficient throughout the entire
State of New York to support even a single plant such as
ours.

To the extent that the milk that you are referring
to will come from other regulated plants, there are many
rules and regulations governing this supply of milk which
are too complex and too varied to be completely available
to my knowledge.

Most of the milk committed to other order
regulated plants other than Order 2 are committed to a par-
ticular use within that order and are available to an Order
2 plant only on rare occasions during surplus conditions or
during a normal part of the year, only available as a result
of high, abnormally high premiums.

Therefore, as a practical matter, are of no con-
sequence to supplying an Order 2 plant.

Mr. Palmer:

Q May I just ask a question which you could probably
bring out through the order, but I just thought it might
be helpful if we had all in one place, as long as we have
a transcript: as a handler of what -- basically, Class 2
milk -- is that correct?

A That is correct.

1 Q Is it all Class 2 milk that you handle?

2 A Not 100 per cent.

3 Q On your Class 2 milk under the order, as under all
4 Federal milk orders, you pay the producers a blend price;
5 right?

6 A That is right.

7 Q Which is less than a Class 1 price but is more
8 than your Class 2 price?

9 A That is correct.

10 Q So that you then will receive a refund, as it
11 were, from the Order 2 producer settlement fund of the differ-
12 ence between the blend price that you pay and your Class 2
13 obligation under the order?

14 A That is right.

15 Q It then is of economic advantage to you to buy
16 Order 2 milk at certain times, as the price for non-Order 2
17 milk exceeds the Class 2 price; is that correct?

18 A Taken in a very limited way, the answer would be
19 yes. Taken as a broader practical answer, we serve the
20 Order 2 pool as a surplus standby facility. We have and do
21 ship Class 1 milk to the market when it becomes either neces-
22 sary or to the advantage of the market itself.

23 During the balance of the year, we carry the sur-
24 plus which we cannot use in the soft cheese manufacturing
25 facility, and dispose of this surplus in the best way we can,

often at an economic loss.

Q Let me ask you another question: the health standards that you spoke of that your plant has to meet, this is because New York State law?

A This is both because of New York State law and the Federal Government. We are a regulated plant under the United States Public Health Service rules and regulations.

Q Why are you a regulated plant under the United States Public Health Service rules and regulations?

A Because we ship product to various facilities outside of the State of New York, and, therefore, are required to carry this type of regulation. We also ship fluid milk to fluid bottling facilities who in turn serve Federally-controlled markets, and, therefore, they, and we in turn, are required to be under the Public Service.

Q You lost me a little bit. I don't know too much about that. That has nothing to do with the Federal Marketing Order; it has nothing to do with the Federal Milk Marketing Order; it is not a requirement?

A No, it is not.

Q The requirement is that you are selling to Federal installations; is that it?

A That is correct. Actually, any eventual vendor that sells to any facility that is connected with the Federal Government -- and I think the classic example is a railroad

1 which is in interstate commerce under the Public Health law,
2 and any plant serving that facility, even however remotely
3 is required to comply with these regulations.

4 Q You bid on Army contracts, you have to comply?

5 A Yes.

6 Q That is the usual reason, I think, bidding on
7 these Government contracts?

8 A Well, no.

9 Q It is one of the reasons. I am sorry. I am
10 just not clear on that particular aspect. But we are clear
11 it is not a result of the requirement of the Federal Milk
12 Marketing Order?

13 A It is not.

14 MR. PALMER: Thank you.

15 JUDGE CAMPBELL: Any further questions?

16 MR. BRADLEY: No questions.

17 MR. TOONEY: Thank you, sir.

18 JUDGE CAMPBELL: Thank you, sir. You are
19 excused.

20 (Thereupon, the witness left the witness chair
21 and resumed his seat in the hearing room.)

22 JUDGE CAMPBELL: Off the record.

23 (Thereupon, there was a brief discussion
24 off the record.)

25 JUDGE CAMPBELL: Suppose we take a mid-afternoon

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1 recess at this time.

2 (Thereupon, there was a fifteen-minute
3 recess.)

4 JUDGE CAMPBELL: Back on the record.

5 MR. TOOMEY: Your Honor please, I would like to
6 recall Mr. Shanback, please.

7 JUDGE CAMPBELL: Let the record show that Mr.
8 Shanback is recalled.

9 Whereupon,

10 MARTIN SHANBACK

11 was recalled as a witness, and having been previously duly
12 sworn, resumed the witness stand, and, upon examination,
13 testified further as follows:

14 REDIRECT EXAMINATION

15 BY MR. TOOMEY:

16 Q Mr. Shanback, can you tell us whether cheese
17 manufacturers^{d in} of Wisconsin and Minnesota is sold in the
18 Order 2 geographic area?

19 MR. PALMER: For the record, I wish to object to
20 maintain a consistency here that everything of that sort
21 should have been gone into at the rule-making hearing.

22 JUDGE CAMPBELL: I think I am going to overrule
23 your objection, Mr. Palmer.

24 A The question to the question is yes.

25 BY MR. TOOMEY:

1 Q Hard cheese and soft cheese?

2 A Hard cheese and soft cheese.

3 MR. TOOMEY: No other questions.

4 CROSS-EXAMINATION

5 BY MR. PALMER:

6 Q Incidentally, do you also ship some of your products
7 towards the West?

8 A We ship a very limited quantity of a product
9 which is primarily ethnic in nature to the Chicago area.

10 Q Is the East Coast then a principal market for
11 cheese?

12 A No more so, in my opinion, than any other part
13 of the country.

14 MR. PALMER: Nothing else.

15 JUDGE CAMPBELL: Thank you, sir.

16 (Thereupon, the witness was excused and left
17 the witness chair and returned to his seat in
18 the hearing room.)

19 MR. TOOMEY: Your Honor please, I rest.

20 MR. PALMER: Maybe we should put in the stipula-
21 tion. There has been much discussion, and I will try it and
22 see if we are in agreement.

23 My understanding is that two of the petitioners,
24 Paleo Dairy and Cuba Dairy, are under Order No. 2, not desig-
25 nated handlers; they are not classified as pool plants.

1 As such, they do not ^{account} ~~count~~ directly to marketing
2 Order 2. They do not file reports. Is that correct, they
3 do not file reports?

4 MR. HAMMERMAN: That is correct.

5 They do not file monthly reports.

6 MR. PALMER: And they do not account directly
7 on the milk they purchase, such milk as they purchase, if
8 for an example it is from a pool plant, the handler from
9 whom they purchase is the one that accounts to marketing order.

10 MR. HAMMERMAN: That is correct, but I think we
11 ought to add that to the extent that these same non-pool
12 plants purchase from a cooperative, they are required to
13 pay the minimum prices stated in the order under Order 2.

14 MR. TOOMEY: I would accept that, and that is
15 our stipulation, and it ^{eliminates} ~~leads~~ to the need for one more witness.

16 MR. PALMER: I stipulate that.

17 JUDGE CAMPBELL: Are you part of that stipulation?

18 MR. BRADLEY: Yes.

19 MR. PALMER: The only thing is his client isn't
20 affected by this.

21 Whereupon,

22 JOE OTTER

23 Was called as a witness, and having been duly sworn by the
24 Administrative Law Judge, assumed the witness chair, and
25 upon examination, testified as follows:

DIRECT EXAMINATION

BY MR. BRADLEY:

Q Mr. Cotter, would you state your name and your address for the record, please?

A Joe Cotter, 9030 Autoville Drive, College Park, Maryland 20740.

Q Mr. Cotter, what is your present occupation?

A I am employed by Lehigh Valley.

Q Immediately prior to your present representation of Lehigh, for whom did you work? Or in what capacity did you serve?

A I was the secretary-treasurer and general manager of Queen City Cooperative Dairy, Cumberland, Maryland.

Q Have you been associated with the dairy industry most of your business and professional life?

A Yes, for 39 years.

Q Were you involved in the hearings in early February of this year which have been alluded to earlier this afternoon?

A Yes.

Q How were you involved?

A I made a statement on behalf of Lehigh Valley Cooperative.

Q Were you involved in any way in attempting to get information from the Department regarding the Minnesota-

1 Wisconsin series and other factors entering into its deci-
2 sion?

3 A From the first day of the hearing, each and
4 every day thereafter. There were eight days.

5 MR. BRADLEY: We have a series of exhibits here,
6 your Honor. The first of them are marked Exhibits 1, 2,
7 and 3, and a set of copies, and I am now giving them to
8 counsel.

9 BY MR. BRADLEY:

10 Q Mr. Cotter, The first one is marked Exhibit 1,
11 Mr. Cotter, the letter dated February 22, 1974. Did you
12 write this letter?

13 (Thereupon, the documents mentioned above
14 were marked Lehigh Exhibits 1, 2, and 3
15 for identification.)

16 A Yes, sir; I did.

17 Q To Mr. Trelogan?

18 A To Mr. Trelogan, that is correct.

19 Q And the letter speaks for itself, but in the
20 course of that, you asked the Department to provide you
21 with a witness for certain questions to be answered; is
22 that correct?

23 A That is correct.

24 Q He replied to that by Exhibit 2, letter dated
25 February 26, 1974; is that correct?

1 A That is correct.

2 Q And he said that it would take approximately
3 two months to supply a witness; is that right?

4 A That is correct.

5 Q Has Mr. Trelogan or anyone else from the Depart-
6 ment ever supplied you or anyone else at Lehigh a witness
7 to be available for questioning?

8 A No, sir.

9 Q Exhibit 3 is a letter dated April 12, 1974, from
10 the Agricultural Marketing Services here addressed to Mr.
11 Creamer on the stationery of the U.S. Department of Agricul-
12 ture, and that attaches to it answers to certain questions;
13 is that correct?

14 A That is correct.

15 Q Are they answers to a Telex which was sent by
16 Mr. Creamer to the Department of Agriculture?

17 A On March 11, 1974.

18 MR. BRADLEY: Your Honor, I would like to have
19 that marked Exhibit 3(a), which, I think, would follow
20 logically.

21 JUDGE CAMPBELL: Off the record.

22 (Thereupon, there was a brief discussion
23 off the record.)

24 JUDGE CAMPBELL: Back on the record.

25 MR. PALMER: Let's get the numbers straight.

1 JUDGE CAMPBELL: Yes.

2 MR. BRADLEY: Exhibits 1, 2, and 3 are stapled
3 together. Exhibit 1 is already marked, and it is the letter
4 to Mr. Trelogan from Mr. Cotter.

5 Exhibit 2 is Mr. Trelogan's response dated Febru-
6 ary 26, 1974, and Exhibit 3 is the Agricultural Marketing
7 Services letter of April 12, 1974, and attached thereto and
8 giving the department's answers, which I just related through
9 the witness to a Telex sent when, Mr. Cotter?

10 THE WITNESS: March 11, 1974.

11 MR. BRADLEY: Which is Lehigh Petitioner's Exhibit
12 3(a).

13 BY MR. BRADLEY:

14 Q Mr. Cotter, in addition to the numbered questions
15 on this Telex, I invite your attention to the last para-
16 graph. Would you read that, please, for the record.

17 A "Lehigh requests hearing to be re-opened under
18 Department rules and continued until such time as vital
19 and relevant information on the HU series requested from
20 the Department herein, as well as a hearing can be introduced
21 and presented by qualified Department witness."

22 MR. PALMER: What is that.

23 MR. BRADLEY: That is the last paragraph of
24 Exhibit 3(a), which is a statement in addition to the numbered
25 questions to 18.

1 JUDGE CAMPBELL: I am sorry. I am lost at
2 this point.

3 MR. BRADLEY: The Telex, your Honor, is the long
4 sheet which is designated 3(a) because it does contain the
5 18 questions which are repeated and to which the answers
6 are given in Exhibit 3.

7 JUDGE CAMPBELL: It also has Exhibit F on it.

8 MR. BRADLEY: That was an old exhibit in a court
9 proceedings, your Honor.

10 JUDGE CAMPBELL: That will be designated 3(a)
11 then.

12 (Thereupon, the document above-mentioned
13 was marked for identification Petitioner
14 Lehigh Valley Exhibit 3(a).)

15 MR. BRADLEY: Thank you, sir.

16 BY MR. BRADLEY:

17 Q In addition to your letter to Mr. Trelogan, did
18 you respond to his letter to you which was Exhibit 2?

19 A Yes, and that was inserted into the record after
20 the Trelogan letter that I wrote, was read into the record,
21 then the response by Mr. Trelogan, and then the observation
22 on Mr. Trelogan's response to my letter was inserted into
23 the record.

24 MR. BRADLEY: Then we would mark as Lehigh's
25 Exhibit 2(a), which would logically follow Exhibit 2, a

1 two-page paper which has at the top "Response to Harry C.
2 Trelogan's letter of February 26, 1974."

3 (Thereupon, the above-mentioned document was
4 marked Petitioner Lehigh Exhibit No. 2(a)
5 for identification.)

6 BY MR. BRADLEY:

7 Q Mr. Cotter, what has been the thrust and direc-
8 tion of your inquiries and communications to the Department
9 of Agriculture right from the beginning of these hearings?

10 A Well, when we were given a press release on the
11 day of the opening of the hearing --

12 MR. PALMER: I would like -- pardon me. Perhaps
13 I should just note a continuing objection because this line
14 of interrogation was allowed previously when Mr. Toomey
15 asked questions of his witness, but I would like a continu-
16 ing objection noted.

17 JUDGE CAMPBELL: All right, sir. Continue.

18 A When we received the news release on the 20th
19 of February, we thought it would be imperative that we see
20 the order --

21 BY MR. BRADLEY:

22 Q Is this referring to the 39 order?

23 A --the 39 order, that had just been signed by the
24 Secretary so that we in turn would be able to ascertain from
25 that order whether there was some material in there that

1 would be helpful in our deliberations, as to what is or
2 was the MW series, the purpose of it, whether it would be
3 a good substantial pricing series that we could in fact be
4 in accord with, and we thought that would be very helpful
5 to us.

6 Consequently, we made every effort -- I did for
7 the eight days of the hearing, talk to a number of people in
8 the Department. I had people that were at that time working
9 for Lehigh also trying to get information on five different
10 occasions they tried. I tried, and each and every time
11 we pursued the matter, we were told it was not available,
12 and we could not get it.

13 Q At one point did you pursue this up as far as
14 the Under Secretary?

15 A Subsequent to the closing of the hearing, I
16 sent and made calls to Mr. Donald Brock who is the -- I
17 guess you would call it -- the executive secretary to the
18 Secretary Butts.

19 I called the man nine different times on four
20 days, March 12 - 15th, asking for and if we could have a
21 meeting with the Secretary of Agriculture. Finally, an ar-
22 rangement was made to come to his office.

23 When we went there, Mr. Brock suggested that
24 we talk to Mr. Peterson.

25 Q Who is that?

1 A Mr. Peterson is the director of the AMS --
2 is that correct? These people would know. Administrator.

3 Q Did you make an effort to get up as high as you
4 could reach within the Department?

5 A Yes. I am going to relate that to you. I told
6 Mr. Brock that we would meet with Mr. Peterson, and we had
7 a meeting with Mr. Peterson and Mr. Forrest and Mr. John
8 Blum.

9 Q Who is Mr. Forrest?

10 A Mr. Forest is the director of the AMS.

11 Q Would that be the Dairy Division of the Market-
12 ing Service?

13 A Yes. We had a meeting with Mr. Forest and Mr.
14 John C. Blum.

15 At that hearing we requested of them -- they had
16 not made a ruling on the emergency rule-making at that time.
17 We asked them to grant us a re-opening of the hearing, and
18 that we felt that there was no real emergency in this in-
19 stance.

20 We were denied that. Peterson said there would
21 be no re-opening of the hearing, he would make that recom-
22 mendation to the Secretary. We walked out of the office.

23 I immediately went from there to Mr. John ^{Knebel} ~~Knoble~~
24 who is the general counsel for the Department of Agriculture.
25 We explained our situation to him, and he said he would look

1 into the matter and we were to get back to him at a subse-
2 quent date.

3 Q Excuse me, but that meeting that you had with Mr.
4 Peterson, did you discuss the MW series?

5 A Yes, we did discuss the MW series.

6 Q Did they admit that that was an issue or deny
7 that that was an issue?

8 A They said that was not the issue, the issue was
9 simply and solely the emergency rule-making, that that was
10 what they were there for, and that was their decision.

11 I went from there to see Mr. Phil Campbell and
12 talked to him and Mr. Campbell said he would look into the
13 matter, and I was to call him.

14 That was on a Monday. I was to call him on a Wednes-
15 day. He in turn would have me check back within in the
16 afternoon. I did that.

17 I talked to Mr. Campbell, and Mr. Campbell --

18 Q What date was this?

19 A That would have been on Monday, March 25th because
20 the order was signed on March 27th, I believe. Is that
21 correct?

22 Q Just testify to the best of your recollection.

23 A To the best of my recollection, that was on the
24 27th. That was on the 25th. I was to call him in the
25 mid-afternoon. I called about 3:30 in the afternoon. Mr.

Campbell said he had talked to Mr. Clayton ^{Yeutter} ~~meager~~ who was the one at that time who would be signing the order on behalf of the secretary.

He said that he has talked to Mr. ^{Yeutter} ~~Yater~~ that afternoon, and wanted me to call Mr. Yater and talk to Mr. Yater and make an appointment and go talk to Mr. Yater and talk to Mr. Yater eyeball to eyeball, and will you call him for the appointment.

I was in the process of trying to call Mr. Yater to set up a meeting. At that time I got a phone call from one of the employees of the Federal Order SG Administrator in Pittsburgh. The Administrator, or the man there -- that was about 4:30 in the afternoon -- he wanted to know what our position was on behalf of Country Belle, which at that time Lehigh was managing Country Bell -- wanted to know what our position would be with respect to voting approval of the emergency approval of the ruling by the Secretary which had been signed that day.

That afternoon, subsequent to Mr. Yater talking to Mr. Campbell, that is.

Q Then you did not actually get to do anything to hold off the entering of the decision, the initial decision?

A That is correct. That afternoon, I finally got Mr. Yater on the phone after much to do, and I wasn't in a very good frame of mind, and I had a few verbal comments to

1 make about this type of procedure. However, he agreed
2 to meet with me the next day, the 29th.

3 I went to Mr. Yater, but prior to going to Mr.
4 Yater's office, we went to the hearing clerk's office, and
5 at 1:10 p.m. that day we secured for the first time a copy
6 of the decision of the 39 Order.

7 Q What day was that?

8 A That was March 28 at 1:10 p.m.

9 Q Generally, what efforts have you made in addition
10 to that to get information from the Department regarding
11 the orders?

12 A Subsequent to that, as you know, we proceeded
13 into the court. We went in on the basis of we felt we had
14 not got a proper hearing. In fact, we had no hearing, proper
15 or otherwise.

16 Q The court has remanded us back to departmental
17 administrative procedures, so let's get back to the Depart-
18 ment.

19 A So then -- and the court also -- I must say this--
20 insisted in its order that the Teletex which at that time
21 had never been responded to, that one week he gave them one
22 week from the day he signed the order to answer and give
23 us a reply to the Teletex. We got that the next day after
24 the hearing.

25 Q Were those answers that you received in your

1 opinion adequate or full answers?

2 A No, sir; they were not. We filed a motion for
3 discovery in the court, and that set forth in the record
4 why we think they are inadequate, from their own publication
5 in a bulletin put out by the Secretary that the Farm Coopera-
6 tive Service, United States Department published in 1971.

7 Q That is the top FCS Report.

8 A FCS Research Report No. 19.

9 Q Without going into all those details, generally
10 have you persisted in your efforts to get information from
11 the Department in regard to the MW series and the orders
12 that the Department has issued.

13 A Yes. We have had a further meeting with some of
14 the people of the Department of Agriculture as recently
15 as June 20th.

16 One day prior to the issuance of the permanent
17 order which was made on the 21st and signed by John C.
18 Blum we had a further meeting.

19 Q By that you mean the recommended decision --

20 A The recommended decision of the second half of
21 the two-pronged hearings that we had between February 20th
22 and February 28th.

23 Q That is the recommended order which will take
24 effect August 1?

25 A That is correct.

Q Did you make any efforts during all this time to

1 get the emergency decision stayed and to get the hearing
2 re-opened? Was that part of the thrust of your efforts?

3 A Yes. We were asking two things: In fact
4 I had been asked by several people in the Department, what
5 do you proposing, what are you talking about.

6 I said, my recommendation would be that we re-
7 vert back to the order as it stood on April 2, which was the
8 butter/powder-MW, the lower of the two. And subsequent to
9 that we would have an adequate hearing, at which time the
10 Department would be able to come forward with their witnesses,
11 their expertise, their knowhow, and put forth the information
12 as to just how the MW does function.

13 We in turn would be able to make a survey, cer-
14 tainly more adequate than we were able to make in the brief
15 notice of call for a hearing between February 14 and Febru-
16 ary 20, when the hearing convened.

17 We did not have adequate time in which to make
18 even but just the preliminary type of investigation, hoping
19 to be able to ascertain just how it does function and did
20 function and how we would anticipate that function in the
21 future.

22 Q Am I fairly summing up your testimony that you
23 have been complaining to the Department repeatedly about the
24 lack of adequate notice and time to prepare for the hearings
25 initially and the unavailability of information which has been

1 strictly within the Department's possession?

2 A That is correct.

3 Q In your opinion, Mr. Cotter, do you feel that your
4 concern about the validity of the KW series is properly
5 reflected in the open and free market conditions has been
6 substantiated by subsequent events?

7 MR. PALMER: Objection.

8 MR. BRADLEY: I will rephrase the questions
9 which will eliminate the objection.

10 BY MR. BRADLEY:

11 Q Have you repeatedly expressed to the Department
12 your concern that the KW series does not properly reflect
13 open market prices, but is rather something subject to cer-
14 tain manipulations by parties in that area?

15 A Yes, we have made that allegation.

16 Q And subsequently have facts come to light which
17 have substantiated that?

18 MR. PALMER: Objection.

19 A Yes, we have made that allegation.

20 JUDGE CAMPBELL: The answer is in.

21 MR. PALMER: I move that it be stricken.

22 JUDGE CAMPBELL: Strike the answer.

23 MR. BRADLEY: There has been in the record al-
24 ready the offer which has been made. Let me just ask a ques-
25 tion.

1 BY MR. BRADLEY:

2 Q You were present when Mr. Toomey made his
3 offer of proof regarding the anti-trust proceedings in the
4 Midwest?

5 A Yes, I was.

6 Q Is this partially substantiating your concern?

7 MR. PALMER: I object. I think if counsel wishes
8 to state I would like to make the same offer of proof that
9 Mr. Toomey made, that is one thing.

10 But to ask the witness to make the offer of proof
11 and to have it in the form of a simple question, that is
12 not correct.

13 MR. BRADLEY: That was not my question. My
14 question was whether the facts stated by Mr. Toomey sub-
15 stantiate your concern about the validity of the MW series.

16 MR. PALMER: Objection. Mr. Toomey made a proffer
17 of facts he wished to prove, and if this witness now says
18 those facts are correct, we now have it into evidence. We
19 have gotten it in behind locked bars, so to speak. I would
20 object to the question, and ask that the answer be stricken.

21 MR. BRADLEY: It is in the nature of a hypo-
22 thetical question.

23 JUDGE CAMPBELL: If you want to support the offer
24 of proof, by all means go ahead.

25 MR. BRADLEY: Let me state it hypothetically, if

1 indeed the facts are true as stated by Mr. Toomey, in your
2 opinion, as an expert in the dairy field, Mr. Cotter, do
3 you believe that this supports your concern that MW does
4 not properly reflect open market conditions.

5 MR. PALMER: I object to the question.

6 JUDGE CAMPBELL: Sustained.

7 MR. PALMER: Would we have the last answer previous
8 stricken because I don't think we got a ruling?

9 THE WITNESS: Mr. Bradley stated another question.

10 MR. BRADLEY: His Honor sustained the objection.

11 MR. PALMER: Let the record show that any answer
12 that was given a moment or two ago that was inconsistent
13 with this objection be stricken.

14 JUDGE CAMPBELL: All right. I think that will
15 clarify it.

16 MR. BRADLEY: I have no further questions.

17 MR. TOOMEY: No questions.

18 CROSS-EXAMINATION

19 BY MR. PALMER:

20 Q Mr. Cotter, let me ask you this -- again I am
21 vague as to what happened on the 39 milk order, but in the
22 course of your visitation to various people at the Department
23 were you advised that the decision itself was in written
24 form and that it was at the hearing clerk's office and that
25 you could see it there but that a copy as such could not be

1 provided you?

2 A No, we were advised that there was a copy -- in
3 fact, I think there were six parts to it, if I am not mis-
4 taken -- it was in the Department, but it was not in the
5 hearing clerk's office. We could not see it.

6 Q Could anybody else see it?

7 A I didn't ask that question.

8 Q Had it been issued yet?

9 A To the best of my knowledge, it had.

10 Q But it hadn't been published in the Federal
11 Register yet?

12 A I don't know.

13 If it had been in the Federal Register, I
14 wouldn't have been down asking them for it.

15 Q I am just trying to get the gist of this. As
16 I say, I didn't know this was coming up today, and I
17 haven't spoken to anybody about it.

18 I am just trying to get my mind clear. Was the
19 gist of your conversations with people in the Department that--
20 and I am speculating here now -- that we issued the press re-
21 lease so that everyone would know that this decision was
22 forthcoming, but it hasn't been published in the Federal
23 Register and accordingly, we cannot make it available until
24 it is published in the Federal Register?

25 Is that what it was?

1 A I didn't consider it that.

2 Q They didn't just say we are not going to give
3 you a copy of it?

4 A They just said you cannot see it.

5 Q You don't know the reason why you couldn't see
6 it?

7 A Well, they didn't give me any reason. They just
8 said you can't see it, we aren't going to give it to you.

9 Q I want to clarify one thing. You said that the
10 court insisted that we answer your Telex within one week.

11 Let me make a statement to you and see if you
12 don't agree. Perhaps you don't know this. But in that
13 court proceeding, the Secretary through me as counsel filed
14 a stipulation stipulating that we would answer the Telex
15 within one week, is that correct?

16 Would you modify your answer to that extent,
17 not that the court insisted, but that the court included
18 in its order what the Government stated to it in the form
19 of a stipulation?

20 A I would like to go back one step beyond that,
21 if you don't mind.

22 Q Without going back beyond one step, is it that
23 you really don't know why it had that in its order, but it
24 could have been because it was a stipulation by counsel that
25 they would provide answers to the Telex within one week?

1 Isn't that a reasonable statement?

2 A I don't know whether it is or not.

3 Q You don't know really why it was in the court
4 order?

5 A But I would like to state one thing.

6 Q Isn't that a reasonable statement?

7 A I don't know whether it is or not.

8 Q You don't know why it was in the court order?

9 A I haven't said that.

10 JUDGE CAMPBELL: Respond to the question.

11 THE WITNESS: I am trying to explain, Mr.
12 Hearing Officer, and I think we -- I think you do want to
13 get all the facts, and I want to give you all the facts.

14 The facts are that on the 28th day of March,
15 in the presence of Mr. Vater --

16 MR. PALMER: That is not responsive to my ques-
17 tion, and I ask that the answer be stricken as non-respon-
18 sive.

19 THE WITNESS: I think the judge wants to hear
20 all the facts.

21 JUDGE CAMPBELL: I think the question had to do
22 with the court proceeding.

23 THE WITNESS: Then I will answer the question,
24 then you want that I make my statement?

25 JUDGE CAMPBELL: I would like your counsel, if

1 he has a question on redirect, to ask that question.

2 MR. BRADLEY: I think the question was the
3 basis for the court order, if he knows.

4 THE WITNESS: I don't know.

5 BY MR. PALMER:

6 Q Let me ask you, sir, request for re-opening of
7 the hearing and so forth, that last request was made at the
8 time of your filing the brief in March, was it not?

9 A We asked for a re-opening of the hearing when we
10 filed our brief, which was on March 8th, I believe. Sub-
11 sequent to that, we then asked for a re-opening of the hear-
12 ing, as I have already stated.

13 Q When did you ask for this?

14 A Whatever the record stated.

15 MR. BRADLEY: May 14, 1974, we asked -- we filed
16 another post-hearing brief in which we asked for these things.

17 MR. PALMER: That was the last time -- May 14th?

18 THE WITNESS: And asked for a re-opening? No.
19 We asked subsequent to that. We asked for a hearing on March
20 28th in Mr. Yater's office with Mr. John Blum.

21 BY MR. PALMER:

22 Q I think we are all getting confused. You said
23 that you asked for it in March, and now counsel has stated
24 that you asked for it May 14th, and then you said subsequent
25 to May 14th, you asked on March --

1 A I asked again. I have asked so many times
2 that I have a hard time keeping it in chronological order.
3 Mr. Palmer, when you ask as many times as I have asked to
4 try to get a hearing re-opened, it is pretty hard to tie
5 it down by the minute and day.

6 Q That's all right. I was just trying to get some
7 dates, I wasn't trying to argue. The last written request
8 was May 14th, is that correct?

9 A Yes, May 14th.

10 Q In any of your requests for re-opening of the
11 hearing, have you suggested an alternate to the Minnesota-
12 Wisconsin price series?

13 A No, sir; we have not.

14 Q Do you wish the Minnesota-Wisconsin price series
15 not to apply to Class 1 pricing under Order 4?

16 A Mr. Palmer, we stated for the record the hearing
17 was called on February 20th for the purpose of determining
18 what was going to be Class 2. We tried to keep it in that
19 context, but other people have tried to put it into Class 1.

20 We only wanted to address ourselves, and that is
21 all we did address ourselves, to was simply and solely
22 Class 2, and for Order 4.

23 Q Is it your proposal that Minnesota-Wisconsin price
24 series not apply at any time to Class 2 prices under Order
25 4?

1 A We have never taken that position.

2 Q So you wouldn't want it to apply at times the
3 butter/powder was lower?

4 A We said -- I think we stated our position, and
5 it is in that record right over there.

6 Q All right, I am not trying to get you to detract
7 from that record. I want to stay within that record, but
8 am I correct in stating that your testimony is that you
9 wish the hearing re-opened to permit you to show that the
10 Minnesota-Wisconsin price series is not ^{an appropriate} pricing mechanism
11 at those times when the Minnesota-Wisconsin price is higher
12 than the butter/powder price?

13 A Never. I have never said that. I have said, Mr.
14 Palmer, that we asked for a re-opening of the hearing. We
15 didn't say when. We said, No. 1, that we felt it imperative
16 that we revert back to the end of the butter/powder snubber
17 as it was on April 2, that subsequent to that, when that
18 time would come I don't know.

19 If the Department could not put a witness on for
20 two months, and we are really going to have an adequate
21 hearing, it might take six months or it might take nine
22 months. We have also said it would take us a considerable
23 amount of time.

24 At the time we both had our shoes on, we would
25 then dance at the hearing. We would then put on what we

1 think would be adequate and substantive data to get to the
2 Secretary so he could make a proper rule-making as to what
3 would be the proper *modus operandi* as to the proper price
4 policy.

5 Q That is your answer. Hold it right there and
6 don't volunteer any statements.

7 (After a pause.)

8 MR. PALMER: That completes it.

9 MR. TOOMEY: Your Honor please, there is one
10 question that occurred to me when Mr. Palmer asked some-
11 thing. May I ask it?

12 JUDGE CAMPBELL: Yes.

13 MR. PALMER: I know we are now consolidating, but
14 I don't know -- go ahead.

15 REDIRECT EXAMINATION

16 BY MR. TOOMEY:

17 Q Going back to the 39 order business. You mentioned
18 you have been in the business 39 years?

19 A That is correct.

20 Q Have you ever known of a prior instance where
21 there was a press release in the Department of Agriculture
22 about a decision that had been made when in fact it hadn't
23 been made yet?

24 A I don't know that.

25 MR. TOOMEY: Thank you.

1 MR. BRADLEY: I would just like to follow up a
2 line of questioning by Mr. Palmer as to whether or not we
3 had suggested alternatives to the MW series, and I invite
4 your attention to our meeting with the Department officials
5 including Mr. Palmer on Thursday, June 20, 1974.

6 REDIRECT EXAMINATION

7 BY MR. BRADLEY:

8 Q Do you recall, Mr. Cotter, that we stated to
9 the Department then that we don't have either the information
10 or the expertise to suggest this, and we are asking the Depart-
11 ment to exercise its legislative mandate to handle it.

12 A That was the last time, it was stated.

13 MR. BRADLEY: That is all I have.

14 JUDGE CAMPBELL: Anything else?

15 MR. BRADLEY: I want to move the admission of
16 Petitioner's Exhibits 1 through 3(a).

17 JUDGE CAMPBELL: What is this document?

18 MR. BRADLEY: It was a statement made by Mr.
19 Cotter. It wasn't marked or intended to be marked.

20 JUDGE CAMPBELL: Is it in all copies of the
21 exhibits?

22 MR. BRADLEY: Yes, it is, your Honor. That is
23 not offered.

24 JUDGE CAMPBELL: Motion has been made to receive
25 in evidence Petitioner's Exhibit 1, 2, 3, 3(a) and

1 3(a).

2 MR. BRADLEY: Yes, sir.

3 JUDGE CAMPBELL: Any objection, Mr. Palmer?

4 MR. PALMER: No. I think within the scope of
5 their exhibits, they are appropriate exhibits.

6 JUDGE CAMPBELL: All right. There being no
7 objection, Petitioner Lehigh Exhibits 1, 2, 3, 2(a) and 3(a)
8 are received in evidence and become part of the record.

9 (Thereupon, the above-mentioned documents
10 were received in evidence as Petitioner
11 Lehigh's Exhibits 1, 2, 3, 3(a) and 2(a).)

12 JUDGE CAMPBELL: Have you received copies, Mr.
13 Palmer?

14 MR. PALMER: Yes.

15 JUDGE CAMPBELL: Do you have further witnesses?

16 MR. BRADLEY: No, sir.

17 MR. PALMER: Let me take a moment. Maybe we
18 won't need any, unless there is something else you want to
19 offer.

20 MR. BRADLEY: Nothing further.

21 JUDGE CAMPBELL: Off the record.

22 (Thereupon, there was a discussion off
23 the record.)

24 JUDGE CAMPBELL: Back on the record.

25 MR. PALMER: We are not going to offer any wit-

1 ness at this particular point of time.

2 As I stated earlier, we are going to go back
3 to our people at our office and make inquiry about this
4 point as to the fact that a copy of the 39 marketing order
5 decision was or was not made available to Mr. Cotter and
6 to others who are petitioners here, and what I would like
7 to do at that point in time is to prepare an affidavit which
8 I will then submit to both counsel, and if they feel they
9 would then need a hearing to examine the affiant, I presume
10 we would have to come back to another hearing.

11 I will try to get that affidavit completed as
12 soon as possible. I don't know, let me find out what the
13 circumstances are by the time that this transcript comes
14 in -- in other words, within the week.

15 JUDGE CAMPBELL: All right, gentlemen, I would
16 assume you would want this affidavit before you start filing
17 briefs.

18 MR. PALMER: That is what I say. My thought
19 right now is that we would be able to get it completed by
20 the end of the week.

21 JUDGE CAMPEELL: It will be filed with the hearing
22 clerk?

23 MR. PALMER: I guess what we will do is file a
24 copy -- send a copy to Mr. Toomey and to Mr. Bradley, and
25 perhaps we could stipulate that within five days of receipt

1 they will advise me one way or the other, whether or not we
2 can just put that into the record, or whether or not we need
3 to go to a hearing.

4 MR. TOOMEY: You don't need five days. I will
5 call you when I get it.

6 MR. PALMER: Okay.

7 MR. TOOMEY: I am just wondering about briefing
8 parameters, and the schedule of those things. Would your
9 Honor like to set that by an order or do you want to dis-
10 cuss it now?

11 JUDGE CAMPBELL: I'd just as soon discuss it
12 right now and set the dates right now.

13 Off the record.

14 (Thereupon, there was a discussion off
15 the record.)

16 JUDGE CAMPBELL: Back on the record.

17 While we were off the record, it was generally
18 agreed by the parties that this would be the briefing sched-
19 ule for this proceeding: petitioner's opening brief will
20 be filed on or before August 2, 1974. Respondent's ^{an} answering
21 brief will be filed on or before August 23, 1974, and petitioner's
22 reply brief will be filed on or before September 6, 1974.

23 In addition, if there are proposed corrections
24 to be made to this record, I would request that you file those
25 on or before July 26, 1974.

Under the Rules of Practice, briefs are filed

1 when they are postmarked.

2 Is there anything further to be considered before
3 we close the record?

4 MR. TOOMEY: There is one additional item.
5 Petitioner's Exhibit 1, which we need additional copies, may
6 we mail them to you since we are not going to be here tomor-
7 row?

8 JUDGE CAMPBELL: Mail them to the hearing clerk.
9 Thank you gentlemen, for your cooperation in
10 this hearing. The hearing is closed.

11 (Thereupon, at 5:30 o'clock p.m., the hearing
12 in the above matter was closed.)
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STIPULATION RESPECTING AMENDED PETITION AND
CERTAIN ADDITIONAL DOCUMENTS

(pp. 1284a-1285a)

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:

CUBA CHEESE COMPANY, et al
Petitioners

:
: AMA Docket
:
: Nos. M 2-46, et al

IN RE:

LEHIGH VALLEY COOPERATIVE
FARMERS
Petitioners

:
: AMA Docket
:
: No. M 4-17

STIPULATION RESPECTING AMENDED PETITION
AND CERTAIN ADDITIONAL DOCUMENTS
TO BE MADE PART OF THE RECORD

It is hereby stipulated and agreed by and among David C. Toomey, Esquire, attorney for Petitioners Cuba Cheese Company, et al; Norman R. Bradley, Esquire, attorney for Petitioner Lehigh Valley Cooperative Farmers and Victor W. Palmer, Esquire and Daniel W. Wentzell, Esquire, attorneys for the Department of Agriculture, as follows:

1. An Amended Petition may be filed by Petitioners in which the final, long-term pricing Order dated July 25, 1974, Docket Nos. AO-71-A68 and AO-160-A51, published in the Federal Register on August 21, 1974 and to become effective October 1, 1974, shall be additionally the subject of the Petition;

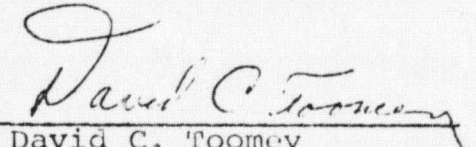
2. That the hearing record made with respect to the original Petition shall also apply to the Amended Petition and that further hearing is waived by all parties;

3. That the Recommended Decision dated June 21, 1974 and the Final Decision dated July 25, 1974 on the Order to be effective October 1, 1974, shall be made part of the record in this proceeding; and

4. That all Briefs heretofore filed or to be filed hereafter shall apply likewise to the Amended Petition as to the original Petition.

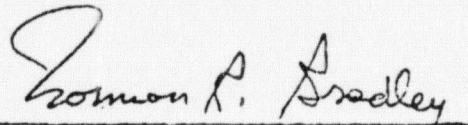
DUANE, MORRIS & HECKSCHER

By:

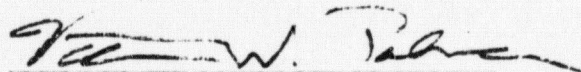

David C. Toomey

SAUL, EWING, REMICK & SAUL

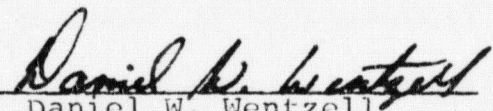
By:


Norman R. Bradley

By:


Victor W. Palmer

By:


Daniel W. Wentzell
Attorneys for Respondent

POINT FOR RULING BY ADMINISTRATIVE LAW JUDGE

Petitioners also request the Administrative Law Judge to add to the record in this matter the Exceptions filed by them to the Recommended Decision and Order. Respondent objects to making such document of record.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION
(pp. 1286a-1343a)

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Cuba Cheese Company, et al.,

Petitioners

AMA Docket No. M 2-46,
et seq.

Initial Decision

Preliminary Statement

This is a proceeding under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 as amended (7 U.S.C. 601 et seq.), hereinafter called the "Act".

Petitioners, nine handlers regulated under Order No. 2^{1/} (Milk in the New York - New Jersey Marketing Area - 7 CFR Part 1002), and one handler regulated under Order No. 4^{2/} (Milk in the Middle Atlantic Marketing Area - 7 CFR Part 1004) challenge two decisions and final orders of the Assistant Secretary of Agriculture amending Federal Milk Orders Nos. 2 and 4. By virtue of the amendments petitioners were obligated for their purchases of

1/Cuba Cheese Company,
Deltown Foods Inc.,
Saratoga Dairy, Inc.,
Queensboro Farm Products, Inc.,
Queens Farms, Inc.,
Crowley's Foods Inc.,
Pollio Dairy Products Corp.,
Friendship Dairies, Inc.,
Elmhurst Milk & Cream Co., Inc.,
2/Lehigh Valley Cooperative Farmers

AMA Dockets Nos. M 2-46
M 2-47
M 2-48
M 2-49
M 2-50
M 2-51
M 2-52
M 2-53
M 2-54
M 4-17



producer milk at prices based on the Minnesota-Wisconsin price series rather than at prices based on the lower of the Minnesota-Wisconsin price series or the butter powder formula.

The rulemaking hearing which gave rise to the challenged decisions and orders was conducted during the period February 20, 1974 through February 28, 1974. The subject matter at that hearing was both the need to amend 8 federal milk marketing orders regarding the pricing provisions for reserve milk and whether an emergency existed requiring immediate action. A partial decision was issued on March 27, 1974 (39 FR 11567) in which an emergency was found to exist. Thereafter an order amending the eight milk orders was issued on March 29, 1974 (39 FR 11980) to provide, for the period April 3, 1974 through July 31, 1974: that the price for reserve milk utilized in manufacturing uses (except butter and nonfat dry milk) in the 8 markets would be based upon the Minnesota-Wisconsin series price, and that milk utilized in butter and nonfat dry milk production would be priced at an amount, not to exceed 50 cents, that the butter powder formula price was less than the Minnesota-Wisconsin series price.

Following the issuance of a recommended decision (39 FR 23063) with respect to the long range pricing provision for reserve milk, the Assistant Secretary issued a final decision on July 25, 1974 (39 FR 27678) which provided that the sole basis for pricing reserve milk (Class II milk in the New York-New Jersey and Middle Atlantic orders) should be "the Minnesota-Wisconsin price for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as announced by the Department for the month." Upon determination of producer approval the Assistant Secretary on August 21, 1974 implemented his final decision through the issuance of an order amending the eight milk orders, to be effective October 1, 1974 (39 FR 30925).

The nine petitions challenging the amendment of Federal Milk Order No. 2 were filed on April 8, 1974, together with applications for interim relief. Respondent filed answers to the petitions and applications on April 25, 1974, and on May 1, 1974, the Judicial Officer denied interim relief. On May 30, 1974, respondent's motion to consolidate the nine petitions was granted.

On May 20, 1974, the petition of Lehigh Valley Cooperative Farmers (hereinafter called "Lehigh") challenging the amendment of Order No. 4 was filed. Following respondent's answer of June 3, 1974, the Lehigh

proceeding was consolidated, upon motion by respondent, with the other nine proceedings.

On July 1, 1974, a prehearing conference and hearing were conducted in Philadelphia, Pennsylvania. The nine petitioners challenging the amendment of Order No. 2 were represented by David C. Toomey, Attorney, of Duane, Morris & Heckscher, of Philadelphia, Pennsylvania. Lehigh was represented by Norman R. Bradley, Attorney, of Saul, Ewing, Remick & Saul of Philadelphia, Pennsylvania. Penn Marva Dairymen's Cooperative Association, Inc., intervenor, was represented by Donald F. Copeland, Attorney, of Speese, Kephart and Bongiovanni, of Philadelphia, Pennsylvania. Respondent was represented by Victor W. Palmer and Daniel W. Wentzell, Attorneys, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. At the close of the hearing, the time was set for filing briefs.

At the time of the hearing on July 1, the Secretary's final decision and order regarding the long range pricing of reserve milk had not been issued. Counsel for petitioners at that hearing offered to stipulate that the record then made would be the same record for review of the future final permanent order. Upon objection by counsel for respondent on the ground that it was not at that time known what the Secretary's final decision and order would be, this Administrative Law Judge ruled that the offer was premature and that we must await the issuance of the permanent order.

Following the issuance of the final decision and order by the Assistant Secretary on July 25 and August 21, 1974, respectively, counsel for the parties filed a stipulation on September 23, 1974, to include for review in this proceeding the Assistant Secretary's decision and order amendments concerning long range pricing of reserve milk in Orders 2 and 4. Amended petitions and answers were filed by the parties and in lieu of reopening the July 1 hearing additional affidavits were submitted by the parties for inclusion in the record. Finally by order dated November 12, 1974 the record in this review proceeding was closed.

In summary then the record for review in this proceeding consists of:

1. The transcript of the July 1, 1974 hearing in this proceeding, briefs filed thereafter, and the affidavits of Messrs. Darr, Cotter, and March filed subsequent to July 1; and
2. The rulemaking hearing record which includes the notice of hearing and the 1094 page transcript, the emergency decision and order, and briefs filed therein, and the long-range recommended decision, final decision, and order, together with briefs, and exceptions therein.^{3/}

^{3/}Hereafter reference to the transcript pages, exhibits, briefs and affidavits pertaining to the July 1 hearing will include the prefix "15-A". Reference to the rulemaking proceeding will include a big R before the citation.

Findings of Fact

1. The petitioners, Cuba Cheese Company, Deltown Foods Inc., Saratoga Dairy, Inc., Queensboro Farm Products, Inc., Queens Farms Inc., Crowley's Foods Inc., Pollio Dairy Products Corp., Friendship Dairies, Inc., and Elmhurst Milk & Cream Co., Inc., handlers under Order No. 2, each operate plants that manufacture milk into various Class II dairy products. With the exception of Cuba Cheese Company and Pollio Dairy Products Corp., the plants of said petitioners are "pool plants" subject to the pricing provisions of Order No. 2, which are not required to ship a prescribed percentage of milk receipts to remain qualified under the order. The plants of Cuba Cheese Company and Pollio Dairy Products Corp., are not "pool plants" and are not subject to the pooling provisions of Order No. 2, but purchase their milk from pool plants or cooperative associations. (Pleadings; 15-a Tr. pp. 77-80, 86-87; R.pp. 431-432)

2. Petitioner, Lehigh Valley Cooperative Farmers, is a handler and a cooperative association of nearly 1,000 dairy farmers, 675 of whom are producers as defined by the provision of Order No. 4. In addition to acting as a bargaining agent for its member producers, Lehigh, operates milk processing plants, including a newly-constructed cheddar cheese manufacturing plant. In this latter capacity it is obligated to account

for the milk it receives from producers in accordance with the classification and pooling provisions of Order No. 4 (15-a Pleadings; R pp. 818, 848-849, 852-855, 871-872).

3. Intervenor, Penn Marva Dairymen's Cooperative Association, Inc., (hereafter called "Penn Marva") is a federation of three cooperative associations of producers, and represents approximately 60 percent of the producers under Order No. 4 and a small number of producers under Order No. 2. Additionally Penn Marva operates a plant at Laurel, Maryland that manufactures milk into various Class II dairy products. This plant utilizes between 25 and 60 million pounds of milk per month (R pp. 197-198, 202, 206-207, 231-232).

4. Federal Milk Orders 2 and 4 were promulgated by the Secretary of Agriculture pursuant to the provisions of the Act. Order No. 2, the New York - New Jersey Order, regulates the handling of milk in approximately half of the geographical area of New York State (generally the Southeastern portion) and approximately half of the geographical area of New Jersey (generally the Northern half of the State). Order No. 4, the Middle Atlantic Order, regulates the handling of milk in Philadelphia, Pennsylvania, the southern half of New Jersey, the State of Delaware, most of Maryland (including the city of Baltimore), the District of Columbia, and northern Virginia. (7 CFR 1002.3, 7 CFR 1004.2)

5. In accordance with the Act, the Secretary of Agriculture issued and presently administers 61 federal milk orders which utilize either a two class or a three class system of segregating milk utilization, with Class I representing what is often described as "fluid uses", such as milk that is bottled, and Class II/III representing the utilization of reserve type milk utilized to manufacture products such as butter and cheese. Milk Orders 2 and 4 utilize a two-class system of milk classification, whereby handlers are required to pay producers ^{higher} minimum prices for milk utilized as Class I than for Class II uses. All handlers report the total amount of milk which they receive from producers each month and the use to which that milk is put. These reports are made to a market administrator, the agency selected by the Secretary to administer a milk order. The market administrator computes the total Class I and II obligation of each handler for the milk he has received from producers by multiplying the amount of milk utilized in Class I by the Class I price and the amount of milk utilized in Class II by the Class II price.

To arrive at a uniform price payable to producers, the use values or Class price values computed for all handlers are then added. This amount is then divided by the total amount of milk delivered by all producers to arrive at the marketwide "blend" or uniform price. The

blend price is announced by the market administrator and each handler is required to pay each of his producers this price for the milk delivered by the producer. Difference between the handler's Class or use value of milk and the uniform price paid to producers, are paid to or withdrawn from a clearing house fund called a producer settlement fund. (7 CFR Parts 1000 through 1139)

6. Different price indices have been used to determine prices for the classes of milk utilization (Classes I and II/III) established by federal milk orders. One of which is the Minnesota-Wisconsin Series Price (hereafter called "M-W price") which was first adopted as the lowest use class price in the Chicago Order beginning September, 1961. This price series represents the average of prices reported as paid to dairy farmers for manufacturing grade milk by a representative group of plants located in Minnesota and Wisconsin. All of the 61 Federal Milk Orders that regulate milk handling in various marketing areas throughout the nation utilize the M-W price in providing a method for fixing monthly Class I prices. The Class I price typically consists of the Minnesota-Wisconsin price plus the sum that has been determined to reflect the difference between manufacturing grade milk prices and the price that is the minimum handlers requiring locally approved milk for fluid milk utili-

zation need pay to assure an adequate supply. The Class II price in many orders with a two class system, is set at the M-W price thereby assuring dairy farmers that their Grade A milk which went to the market's reserve uses will be accounted for at no less than the price farmers producing milk of only manufacturing grade are receiving.

Another price index is the butter-powder formula (hereafter called the "b-p price") which is computed from market quotations for butter and skim milk powder.

These indices are more fully described in the Secretary's decisions reproduced, infra. See also: R pp 599-600; R Ex 33, 40 pp 19-21, 31, 85-88, 100-106; 15-a Lehigh Ex 2 and 3; and 26 FR 7134, 7136-7137, Aug. 9, 1961.

Federal milk orders for the northeast markets, including Orders 2 and 4, contained, prior to the partial and permanent decisions of the Secretary, provisions fixing the Class II price at the lesser of the M-W price or the b-p price. (7 CFR 1002.50 and 50a and 1004.50 and 51 (1974 edition))

7. In response to proposals by industry members which proposals were precipitated by recent and wide divergence of the M-W and b-p prices, the Deputy Administrator, Regulatory Programs, on February 12, 1974, issued notice that a hearing would begin on February 20, 1974 to consider proposed amendments to eight milk orders^{4/} and to consider whether emergency marketing conditions warranted omission of a recommended decision.

The notice as published in the Federal Register on February 14, 1974 (39 FR 5642) contained 17 proposals. The proposals suggested various amendments of the reserve milk pricing provisions of the eight milk orders.

General it was proposed that the price of reserve milk be:

- a. Based solely on the M-W price (Proposals 1,2,3,4,10,11);
- b. Based solely on the M-W price during July through March, and based on the lower of the M-W and b-p prices during April through June (Proposal 5);

4/Order

1001 (7.CFR)...	Boston Regional
1002	New York-New Jersey
1004	Middle Atlantic
1015	Connecticut
1033	Ohio Valley
1036	Eastern Ohio-Western Pennsylvania
1040	Southern Michigan
1049	Indiana

c. Based on the average of the M-W and b-p prices, except milk utilized in butter and skim milk powder which was to be based at the lower of the M-W or b-p prices. (Proposals 6, 7); and

d. Based on the M-W price, except milk used to produce butter and skim milk powder which is to be priced at the b-p price. (Proposals 8, 15, 16).

In addition proposal 9 requested emergency consideration of the proposed amendments, while proposals 12, 13, and 14 concerned other aspects of reserve milk pricing and classification.

8. Pursuant to notice a hearing was conducted in Washington, D.C. during the period February 20, 1974 through February 28, 1974. The hearing record consisting of 1094 pages and 46 exhibits contains the testimony in support and in opposition to the emergency aspects as well as the various proposals contained in the notice. Some of the evidence adduced at the hearing is summarized as follows:

The need for higher and adequate prices to dairy farmers prevails throughout the United States. (R. pp. 382-383, 400-401)

Additional^f milk production is needed to assure an adequate supply of milk. (R. p. 632)

During 9 of the 12 months of 1973, the M-W price was lower than the b-p price and was the effective class II/III price in the eight market regions. The M-W price is also used as the basic formula price to arrive at the Class I price. (R. pp. 228-229, 635, 821; Ex. 12, table 1, Ex. 14, table 1)

The butter-powder formula provisions were added to the orders as an alternative basis for pricing reserve milk to assure that the annual price level for reserve milk would not rise above a fixed margin under the market value of butter and nonfat dry milk powder (R. p. 284). Milk supplies in the Northeast have declined steadily and at an alarming rate since mid-1972 (R. pp. 295-297 and Table No. 9 of Ex. No. 14). As a result, the quantity of reserve milk associated with these markets has declined substantially and is no longer the burdensome problem that it was in earlier years. (R. p. 298, Table No. 10 of Ex. No. 14, Ex. Nos. 9 and 12). The quantities of reserve milk manufactured into butter and powder, likewise, have declined substantially from previous levels, both in absolute terms and as a percentage of reserve milk supplies. (R. pp. 297-300, 744-748, 755, Table No. 11 of Ex. No. 14) Under such conditions which are expected to prevail throughout 1974 and perhaps longer, the elimination of the b-p provisions of the eight orders, should not result in a serious problem in clearing these markets of reserve milk supplies in the foreseeable future (R. p. 300).

Since October 1973, the b-p prices computed pursuant to provisions of the eight orders had been distorted by imports of butter and nonfat dry milk powder (R. pp. 199, 230-231, 287-292, 402 and 596-598). Said prices had fallen below the M-W prices by 47 cents, 78 cents and \$1.13 in October, November and December 1973, respectively; and by \$1.18 in January 1974 (R. pp. 199, 588-589, 718 and Table No. 2 of Ex. 14)^{5/}

The lower reserve milk prices likely to result from the application of the b-p formula could seriously depress uniform prices payable to producers. The impact through use of the b-p price rather than the M-W price in determining reserve milk prices for the four-month period of October 1973 through January 1974 in five of the eight markets is as follows:

a. Nearly \$10.7 million has been lost to the New York-New Jersey Pool, as a result of the b-p prices being the determinant of Class II prices.

b. Five markets taken together (Orders 1,2,4,15,36) have lost a total of nearly \$21 million in the four months since the b-p price has been the reserve milk pricing factor. This has amounted to a weighted average reduction of nearly 32 cents a hundredweight on uniform prices for the four month period. (R. pp. 293-297, 316, Ex. 14, table 8)

^{5/}The b-p price was below the M-W price by \$1.19 and 73 cents in February and March 1974, and in April and May 1974 the M-W price was below the b-p price (15-a Tr. pp. 24-25).

While gross dairy income rose about ten percent in 1973, prices paid by dairy farmers for production items were up 20 percent from a year earlier. Progressive decline has been experienced in numbers of dairy farms, in numbers of cows in production, and in production per cow and in total milk production. This pattern of decline which persisted in 1973 is continuing in 1974; with production in January 1974 three percent less than in January 1973. (R. pp. 53-57, 81-83, Ex. 9)

Regular monthly use of the b-p price as the determinant of reserve milk prices on a long-term basis will depress uniform prices payable to producers. Such price depression would be counter-productive and could result in insufficient supplies and production to meet current and anticipated needs for milk and milk products. This would be contrary to the stated intent of the Act and of the orders promulgated thereunder (R. pp. 294-297).

The progressive departure of the b-p price from the M-W price has resulted in a significant drop in the blend price at a time when dairy producers are experiencing even further increases in their cost of production. Unless the b-p price is eliminated as a pricing mechanism, producers will be forced to discontinue production at a time when milk production is declining rapidly, thus further jeopardizing future

milk supplies for this nation. (R. pp. 58-59, 92-93, 1052)

"In summary, there is some question as to whether the use of a smubber to the Minnesota-Wisconsin price carries out the surplus pricing objective of providing the highest possible returns to producers. It does, of course, provide relief for butter-powder plants during the periods when significant differences between the Minnesota-Wisconsin prices and butter-powder product values prevail." (R. Ex 40, p. 88)

Dairy farmers suffer a loss of \$275,000 each day that elimination of the b-p formula is delayed. (Exhibit 10, pages 1 and 2, R. p. 1051) The evidence of losses in income to producers, in producer numbers, and in volume of production, clearly requires emergency action in eliminating the b-p price. (R. pp. 1051-1052)

Use of the b-p formula, instead of the M-W price, as the manufacturing class price, for December 1973, decreased the blend prices in Orders 1, 2, 4, 33, 36 and 40 respectively, 38 cents, 47 cents, 54 cents, 23 cents, 28 cents and 46 cents per hundredweight. The gross effect for the month of December 1973, in loss of money returns for the producer milk controlled by said orders was \$8,189,200. (R. pp. 62-63; Ex. 10)

The M-W price reflects the value of milk going into manufactured products. (R. pp. 98, 599) Wisconsin and Minnesota produce approximately 40 percent of the butter in the United States; 50 percent of the cheese;

and about 43 percent of the nonfat dry milk. (R. pp. 109-110)

An erosion of the M-W series by use of b-p price now provided in the eight orders, will result in a drastic reduction of milk prices in every federally regulated area in the United States. (R. pp. 144-145)

The Secretary's decision issued February 19, 1974 involving 39 Orders determined that the milk used in the manufactured class, including cheese utilization and butter-powder utilization, should be priced at the M-W series price. This action by the Secretary, along with similar proposed action regarding the Orders in the northeast would help bring about the orderly marketing and pricing of milk in the United States. (R. pp. 139-140, 1050-1051, 1056-1057)

By eliminating the b-p price, the milk used to manufacture 85 percent of the nation's butter, 97 percent of the nation's cheese and 87 percent of the nation's nonfat dry milk would be priced uniformly, and would provide a strong foundation for orderly marketing. (R. p. 1053)

Manufactured products originating from the eight Order areas are competing with similar products manufactured in the midwestern areas. (R. pp. 307, 665, 714-715, 732)

Importance of maintaining price alignment between Orders 33 and 49, (R. pp. 723, 724, 731).

Producers are now in a critical cost-price squeeze, resulting in the culling of herds, or of many producers going out of the dairy business; the dairy industry in New England and the northeast is facing an uncertain future; and an increase in milk price to the dairy farmer is essential if adequate supplies of milk are to be maintained. (R. pp. 357-364)

Elimination of the b-p formula as the Class II pricing mechanism in Order 49 is necessary to assure handlers of an adequate supply of milk for the Indiana market.

As the result of the b-p formula being the effective Class II price determinant in Order 49, said Order's blend price has been 35 to 40 cents out of alignment with the Chicago Order No. 30 market, affecting common procurement areas (R. pp. 249-255).

Amendments should be accomplished through expedited action, particularly because of the wide differences which have recently developed between the Class II prices resulting from the use of the b-p formula and the M-W price. The use of the b-p formula results in a substantial increase in the

spread between the Class I and Class II price for the current month. The Class I price in Order 4 for January 1974, f.o.b. Philadelphia was \$10.48 per hundredweight, while the Class II price was only \$7.03 per hundredweight. (R. p. 198)

The broad difference between the price of Federal Order milk utilized in Class II products in the northeast Orders (by reason of b-p pricing) and the corresponding price in other Federal Orders, is contrary to uniform pricing among the several Federal Order markets. If this situation continues, serious dislocations will occur in the location of production facilities. Elimination of the b-p should be carried through all of the northeast Orders. (R. pp. 201-202)

The decline in milk production makes it imperative that b-p pricing be eliminated on an expedited basis, by March 1, 1974, if possible. (R. pp. 202, 250-251, 258, 265-272, 370, 47-50, 1052)

Opposition to the removal of the b-p price was generally that:

The removal of the b-p price and the use of the M-W series would result in manufacturing milk prices at levels which would not permit the market to be cleared of surplus milk through ordinary channels (R. pp. 889-90);

The effect on consumer prices and consumer acceptance of dairy products would be adverse (R. pp. 890-892, 896-897, Ex. 34).

The removal of the b-p price would result in inequities between regulated proprietary handlers and unregulated proprietary handlers, and inequities between proprietary handlers and cooperative handlers (R. pp. 897-898);

Consideration of higher manufacturing milk prices in the eight milk orders would not take into account the high Class I prices in the Northeast Orders and the resultant high blends (R. pp. 901-902 and Ex. 34, Chart H);

The M-W series is not an appropriate series on which to base manufacturing milk prices in the Northeast Orders (R. pp. 472, 829, 899).

9. During the February 20-28 hearing certain handlers requested the Secretary to produce information and a witness to present detailed information concerning the operations of the plants filing reports with the Statistical Reporting Service of the Department of Agriculture which are used to formulate the monthly announced M-W price. At the time of the request for such information, one attorney representing a producer organization opposed the request, while another cautioned the Department about the release of detailed information submitted to the Department on

a confidential basis, but which is otherwise available on a composite basis.

It was pointed out to these handlers at the time of their request that the information sought appeared to be a type that the Department of Agriculture is required to keep confidential. Requests were also submitted to the Statistical Reporting Service in a letter prepared by a representative of Lehigh, which was delivered on February 22, 1974, to the Administrator, Statistical Reporting Service (R. Ex. 32; 15-a Lehigh Ex. 1). On February 26, 1974, said Administrator sent his reply (R. Ex. 33; 15-a Lehigh Ex. 2) which responded to the inquiries of and Lehigh and the other handlers/which declined to furnish a witness to answer further questions on the grounds that it would require the hand sorting of reports and preparation of a study requiring at least two months time to complete. Further information was furnished to Lehigh on April 12, 1974. Lehigh's representative testified at the rule making hearing that it was never his intention to seek confidential information from the Department. (R. pp. 186-192, 533-535, 830-845, 878, Ex. 32, 33; 15-a Tr. pp. 89-93, Ex. (Lehigh) 1, 2, 2a, 3, and 3a)

10. During the course of the February 20-28 hearing representatives of the petitioners attempted to obtain or see copies of the decisions relating to the 39 Orders which were issued by the Assistant Secretary on February 19, 1974, and published in the Federal Register on March 4 (39 FR 8202-8292), March 5 (39 FR 8452-8579), March 6 (39 FR 8712-8853) and on March 7, 1974 (39 FR 9012-9139). The four separate decisions consisted of 489 pages in the federal register (1100 regular pages according to respondent's brief). Because of the bulky nature of the documents, copies were not available for distribution prior to publication in the Federal Register. According to an affidavit filed by Mr. Joseph Cotter on August 30, 1974 in the 15-a proceeding, no one suggested that he could see a copy of the decisions in the Hearing Clerk's office, where (15-a Tr. p. 98) Mr. Cotter ultimately obtained a copy. (15-a Tr. pp. 36-37, 45-49, 93-94, 98, 103-105, 110; 15-a affidavits of David E. Derr (July 9, 1974) and of Joseph Cotter (Aug. 30, 1974))

11. On March 27, 1974 the Assistant Secretary, following a period of time in which interested parties filed briefs and proposed findings and conclusions, issued a partial decision in the rule making proceeding. The Assistant Secretary found that "the due and timely execution of the

functions of the Secretary under the Act imperatively and unavoidably requires the omission of a recommended decision and opportunity for exceptions thereon" as to the need for amending the provisions of the eight orders during the April-July 1974 period. He then determined that for such four-month period the price for reserve milk disposed in manufacturing uses other than butter and non-fat dry milk should be based on the announced M-W price, and that milk utilized to manufacture butter and non-fat dry milk should be priced below the M-W price by the amount, not to exceed fifty cents, that the b-p price is less than the M-W price.

Portions of the decision and proposed order amendments as were published in the Federal Register on March 29, 1974 (39 FR 11567) are reproduced on the following four pages.

3. Whether an emergency exists to warrant the omission of a recommended decision.

Sixteen proposals concerning the pricing of milk to which the butter-powder formula applies were submitted by interested parties for consideration at the hearing. Certain of the proposals called for either emergency suspension or immediate amendment action with respect to elimination of the butter-powder pricing formula. Other proposals involved adoption of new pricing formulas.

This partial decision deals with issues 1 and 3. Issue 2 is reserved for later decision.

FINDINGS AND CONCLUSIONS

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. *The immediate need for making inoperative the butter-powder formula under each order during the next few months.* The price for reserve milk disposed of in manufacturing uses other than butter and nonfat dry milk in the eight markets under consideration should not be based on the butter-powder formula price but rather on the average of prices paid for manufacturing grade milk in Minnesota and Wisconsin. Milk utilized in butter and nonfat dry milk production in this April-July 1974 period should be priced below such Minnesota-Wisconsin price by the amount, not to exceed 50 cents, that the butter-powder formula price is less than the Minnesota-Wisconsin price.

Since mid-1968 in the four northeastern markets and for several years prior thereto in the other four markets, reserve milk (Class II milk under the Boston Regional, Connecticut, Indiana, Middle Atlantic, and New York-New Jersey orders and Class III milk under the Eastern Ohio-Western Pennsylvania, Ohio Valley, and Southern Michigan orders) has been priced at the lower of either the Minnesota-Wisconsin price or a butter-nonfat dry milk formula price. Except for a few occasions, these two pricing formulas have been in close alignment. Annually, the butter-powder formula price and the Minnesota-Wisconsin price have been in relative balance. For instance, the butter-powder formula price averaged 5 cents per hundredweight below the Minnesota-Wisconsin price in 1968, 17 cents below in 1969, 10 cents below in 1970, 6 cents above in 1971, 2 cents below in 1972, and 7 cents below in 1973.

Since January 1, 1969, there have been three periods when the Minnesota-Wisconsin price and the butter-powder formula price varied by more than 25 cents per hundredweight. The first period was October-December 1969 and January-April 1970 when the Minnesota-Wisconsin price varied from 31 to 42 cents over the butter-powder formula price; the second period was in August and September 1973 when the butter-powder formula price exceeded the Minnesota-Wisconsin price 36 and 33 cents,

respectively; and finally, since October 1973, the Minnesota-Wisconsin price has exceeded the butter-powder formula price by \$0.47, \$0.78, \$1.13, and \$1.18 for October, November, and December 1973, and January 1974, respectively.

This current unprecedented disparity between these two formulas is a result of a \$2.32 increase since July 1973 in the prices paid for manufacturing grade milk as reflected in the Minnesota-Wisconsin pay price series compared to an increase of \$1.00 in the butter-powder formula price. Substantive differences between the two price formulas are likely to continue at least through the immediate peak production months.

Substantial quantities of milk used to produce manufactured dairy products are associated with the eight orders. The annual volume of reserve milk supplies priced under the eight orders in 1971, 1972, and 1973 ranged from 26 to 28 billion pounds. Such reserve supplies have represented about 45 percent of the total volume of Class II and Class III milk priced under all Federal milk orders. Moreover, nearly 40 percent of the reserve supplies in the eight markets is produced during the four-month period, April-July.

When considered collectively for all eight markets, the principal regular outlets for reserve milk is in the so-called soft products such as cream, cottage cheese, ice cream, and ice milk mixes and condensed products. To a lesser extent, reserve milk in the eight markets is also used in hard cheese production. During the months of seasonally high production, significant quantities of butter and nonfat dry milk are processed since producer receipts exceed the volume of milk that can be utilized in the other lowest class use outlets.

The butter-powder formula was adopted under these orders principally on the basis that butter and nonfat dry milk plants were used to process milk in excess of Class I and soft product uses. Recently hard cheese production has increased in this northeastern region and such outlet for milk now accounts for a greater proportion of the market for seasonal reserve milk supplies.

A compelling reason that immediate action be taken is to eliminate the competitive disparity that currently exists between processors of reserve milk in the eight markets under consideration and similar processors in other Federal orders and unregulated processors of manufactured dairy products. The competitive market for products manufactured from reserve milk is essentially national in scope. Hence, dairy products manufactured from Federal order priced reserve milk compete with products made from unregulated manufacturing grade milk. In recognition of this fact, it is essential that prices for reserve milk be maintained at comparable levels among Federal order markets with prevailing competitive pay prices for manufacturing grade milk at plants buying such milk.

Under existing circumstances, the current prices of reserve milk as established by the butter-powder price formula in

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and the applicable rules of practice (7 CFR Part 906), at Washington, D.C., on February 20-28, 1974, pursuant to notice thereof issued on February 14, 1974 (39 FR 5642).

The material issues on the record of the hearing relate to:

1. *The immediate need for making inoperative the butter-powder formula under each order during the next few months.*

2. *Appropriate longer-term basis of pricing reserve milk under the eight orders.*

The eight markets under consideration are substantially below the competitive market value of milk for similar uses in other Federal orders as well as the prices being paid by unregulated processors of manufacturing grade milk. Processors of reserve milk in the eight markets have a substantially lower milk cost and thus higher gross margins are available to them than for their competitors. This disparity, if permitted to continue, will lead to dislocation of normal production and processing patterns and disruption of normal efficient marketing channels. To achieve competitive equality it is necessary to provide uniform pricing of reserve milk under the eight orders herein considered and the adjacent nearby orders to the West as well as align such prices with the competitive pay prices being paid for the majority of unregulated manufacturing grade milk in the United States. It is concluded, therefore, that this objective can best be achieved through the use of the Minnesota-Wisconsin price series.

It is quite evident that current reserve milk prices in the eight markets herein considered are not providing producers a return for that portion of their milk utilized in manufactured dairy products reflecting its full use value. Producers should not be expected to continue to accept less for their milk not needed for Class I uses than its full use value.

The current lower reserve price levels are provided by the butter-powder price formula are significantly depressing the uniform price received by producers. The amount of this depressing effect on uniform prices varies among markets by the proportion of reserve milk for a particular market in a given month. However, the record evidence indicated that the relative impact on uniform prices of using the butter-powder formula price rather than the Minnesota-Wisconsin price in determining reserve milk prices for the four-month period, October 1973-January 1974, in five markets (New York-New Jersey, Boston Regional, Connecticut, Middle Atlantic, and Eastern Ohio-Western Pennsylvania) was a weighted average reduction of nearly 32 cents per hundredweight.

Under this price depressing situation, dairy farmers are not encouraged to maintain milk production at levels necessary to meet current and anticipated market needs for milk and milk products. For the eight markets under consideration, total producer receipts in 1973 decreased 4.8 percent from 1972. Receipts in December were 4.6 percent below a year ago. The percentage of producer milk utilized in Class I in the eight markets increased from 60.3 percent in 1972 to 62.4 percent in 1973. Utilization of Class I milk in December 1973 was 64.4 percent.

Under these market conditions, an immediate increase in reserve milk prices will help encourage the production of

adequate supplies of milk since total U.S. milk production is less than domestic demand for milk and the markets represent a large proportion of total U.S. milk production.

Certain producer groups strongly urged that the current inequities in reserve milk pricing in the eight orders can best be achieved by immediately suspending the application of the butter-powder price formula. Under this proposal, all reserve milk would be priced at the Minnesota-Wisconsin price. This proposed course of action is not adopted since it fails to consider that some reserve milk during this flush period will have no other available market outlet than in butter and powder production which, at present, is a lower-valued use of reserve milk.

As indicated previously, this decision provides for a special price for reserve milk used to produce butter and nonfat dry milk for the April-July 1974 period at not more than 50 cents per hundredweight less than the price applicable to milk used in other manufactured dairy products. This special price is designed to recognize the lower use value of reserve milk utilized in butter and nonfat dry milk production. It should accommodate the orderly disposition of reserve milk that cannot be utilized in other manufactured products, which may occur during the seasonal flush.

The average prices paid at butter and by-product plants in the U.S. in recent months has not dropped more than 42 cents under the Minnesota-Wisconsin price. An amount in excess of the 50-cent limit adopted, such as the \$1.18 which the butter-powder formula would provide, could result in a special butter-powder price sufficiently below the regular reserve milk price to encourage processors of ice cream and cottage cheese to displace producer milk with nonfat dry milk and butter made from milk priced at the lower special price. The net effect of this potential substitution, if practiced by handlers, would lower total returns to producers.

In order to facilitate and equitably apply this special butter-powder price, the accompanying amendatory orders provide an additional provision to the handler's pool obligation treating the 50 cent price differential as a credit.

To facilitate the marketing of excess milk supplies, milk and cream moved to a nonpool plant for processing into butter and nonfat dry milk should be eligible for the credit to the extent that the amount processed into such products in the plant is sufficient to account for the amount of milk moved to such plant. In the event that there is an insufficient quantity of butter and nonfat dry milk made in a plant to account for the receipts from more than one Federal order source, the quantity processed into butter and nonfat dry milk should be prorated

among those Federal order sources for which a similar price credit is allowed.

Two of the orders, Middle Atlantic and Southern Michigan, contain a base-excess plan of payments to producers. Since the excess price under the orders is based on the lowest class price, the credits on milk used to produce butter and nonfat dry milk appropriately should be allocated against the value of excess milk to the extent that the volume of excess milk is sufficient to cover the volume of milk on which the credit is allowed.

3. Whether an emergency exists to warrant the omission of a recommended decision. The due and timely execution of the function of the Secretary under the Act imperatively and unavoidably requires the omission of a recommended decision and opportunity for exceptions thereto on Issue No. 1. The current marketing conditions in the aforesaid marketing areas are such that it is urgent that remedial action be taken as soon as possible. It is necessary to correct at the earliest opportunity the disparity in alignment of reserve milk prices under the eight orders with the order prices in the midwest as well as the prices being paid for manufacturing grade milk. Accordingly, the requests for a recommended decision are denied.

The notice of hearing stated that consideration would be given to economic and emergency marketing conditions relating to the proposed amendments. Certain parties at the hearing requested emergency action be taken. Interim emergency action is necessary pending a detailed review of new pricing formulas presented on the record.

It is therefore determined that good cause exists for the omission of the recommended decision and the opportunity for filing exceptions thereto.

RULINGS ON PROPOSED FINDINGS AND CONCLUSIONS

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

On the record of the hearing, separate motions were presented to the Administrative Law Judge that (1) the scope of the hearing be broadened to consider the proposed revision of all classification provisions of the orders, as well as to include the proposed revision of many additional Federal milk orders; and (2) the Department provide information during the hearing as to the identity, type of operation, and market outlet of products

processed by plants handling manufacturing grade milk in the States of Minnesota and Wisconsin. The motions were denied.

In post-hearing briefs, it was requested that consideration be given to a reversal of the rulings.

The Administrative Law Judge's rulings have been reviewed in light of the arguments presented. The rulings, for the reasons stated by the Administrative Law Judge on the record, are hereby affirmed.

GENERAL FINDINGS

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the aforesaid orders and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) The tentative marketing agreements and the orders, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act:

(b) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing areas, and the minimum prices specified in the tentative marketing agreements and the orders, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreements and the orders, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, marketing agreements upon which a hearing has been held.

MARKETING AGREEMENT AND ORDER

Annexed hereto and made a part hereof are two documents, a marketing agreement regulating the handling of milk, and an order amending the orders regulating the handling of milk in the aforesaid specified marketing areas, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered, That this entire decision, except the attached marketing agreement, be published in the FEDERAL REGISTER. The regulatory provisions of the marketing agreements are identical with those contained in the orders as hereby proposed to be amended by the attached order which is published with this decision.

* Filed as part of original document.

DETERMINATION OF PRODUCT APPROVAL AND REPRESENTATIVE PERIOD

December 1973 (September 1973 for the New York-New Jersey order) is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the orders, as amended and as hereby proposed to be amended, regulating the handling of milk in the aforesaid specified marketing areas, is approved or favored by producers, as defined under the terms of each of the orders (as amended and as hereby proposed to be amended), who during such representative period were engaged in the production of milk for sale within the aforesaid marketing areas.

Signed at Washington, D.C., on: March 27, 1974.

CLAYTON YEUTTER,
Assistant Secretary.

ORDER AMENDING THE ORDER, REGULATING THE HANDLING OF MILK IN THE CERTAIN SPECIFIED MARKETING AREAS.

FINDINGS AND DETERMINATIONS

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein. The following findings are hereby made with respect to each of the aforesaid orders.

(a) Findings. A public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the aforesaid specified marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, and the minimum prices specified in the order as hereby amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and whole-

* This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

some milk, and be in the public interest; and

(3) The said order as thereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order relative to handling. It is therefore ordered that on and after the effective date hereof the handling of milk in each of the specified marketing areas shall be in conformity to and in compliance with the terms and conditions of each of the orders, as amended, and as hereby amended, as follows:

PART 1001—MILK IN THE BOSTON REGIONAL MARKETING AREA

1. The introductory text of § 100.61(b) preceding the table is revised as follows:

§ 1001.61 Class prices.

(b) Class II price. Subject to the adjustment set forth below for the applicable month, the Class II price shall be the lesser of the basic formula price for the month or a butterpowder formula price for the month computed pursuant to paragraph (b)(1) through (3) of this section: *Provided*, That from the effective date hereof through July 1974, the price computed pursuant to paragraph (b)(1) through (3) of this section shall not be the Class II price.

2. In § 1001.64, a new paragraph (j) is added as follows:

§ 1001.64 Computation of value of fluid milk products at class prices.

(j) Deduct for each of the months from the effective date hereof through July 1974, an amount computed by multiplying the quantity of producer milk classified as Class II milk and used to produce butter or nonfat dry milk by the lesser of 50 cents per hundredweight or the amount that the basic formula price exceeds the price computed pursuant to § 1001.61(b)(1) through (3).

PART 1002—MILK IN THE NEW YORK-NEW JERSEY MARKETING AREA

1. The introductory text of § 1002.50a(c) preceding the table is revised as follows:

§ 1002.50a Class prices.

(c) Subject to the adjustment set forth below for the applicable month, the Class II price shall be the lesser of the basic formula price for the month or a butter-powder formula price computed pursuant to paragraph (c)(1) through (3) of this section: *Provided*, That from the effective date hereof through July 1974, the price computed pursuant to paragraph (c)(1) through (3) of this section shall not be the Class II price.

PROPOSED RULES

3. In § 1002.70, the introductory text is revised and a new paragraph (f) is added as follows:

§ 1002.70 Net pool obligation of handlers.

Each handler's net pool obligation for milk received at each plant and unit shall be computed separately pursuant to paragraphs (a) through (d) of this section and then combined into one total to be adjusted by any credit applicable pursuant to paragraphs (e) and (f) of this section to determine the handler's total net pool obligation.

(f) Deduct for each of the months from the effective date hereof through July 1974, an amount computed by multiplying the quantity of pool milk classified as Class II milk and used to produce butter or nonfat dry milk by the lesser of 50 cents per hundredweight or the amount that the basic formula price exceeds the price computed pursuant to § 1002.50a(c) (1) through (3).

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. The introductory text of § 1004.50(b) preceding the table is revised as follows:

§ 1004.50 Class prices.

(b) *Class II price.* Subject to the adjustment set forth below for the applicable month, the Class II price shall be the lesser of the basic formula price for the month or a butter-powder formula price computed pursuant to paragraph (b) (1) through (3) of this section: *Provided*, That from the effective date hereof through July 1974, the price computed pursuant to paragraph (b) (1) through (3) of this section shall not be the Class II price.

2. In § 1004.60, a new paragraph (f) is added as follows:

§ 1004.60 Pool obligation of each pool handler.

(f) Deduct for each of the months from the effective date hereof through July 1974 an amount computed by multiplying the quantity of producer milk classified as Class II milk used to produce butter or nonfat dry milk by the lesser of 50 cents per hundredweight or the amount that the basic formula price exceeds the price computed pursuant to § 1004.50(b) (1) through (3).

3. In § 1004.61, paragraph (b) (1) (i) is revised as follows:

§ 1004.61 Computation of weighted average price and uniform prices for base milk and excess milk.

(b)

(1)

(i) Multiply the quantity of such milk which does not exceed the total quantity of producer milk received by such handlers assigned to Class II milk by the Class II milk price less 5 cents: *Provided*, That for each month from the effective

date hereof through July 1974, there shall be deducted from the value of such excess milk an amount determined pursuant to § 1004.60(f) that is not in excess of an amount determined by multiplying the quantity of excess milk by the lesser of 50 cents per hundredweight or the amount that the basic formula price exceeds the price computed pursuant to § 1004.50(b) (1) through (3);

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12. On March 29, 1974 the Assistant Secretary, having determined the requisite producer-approval, issued an order amending effective April 3, 1974, the eight milk orders in the manner described in finding 11, supra. (39 FR 11980).

13. On June 21, 1974, the Associate Administrator, following a period of time in which interested parties filed briefs and proposed findings and conclusions, issued a recommended decision involving a long-term or permanent basis of pricing reserve milk under the eight orders (39 FR 23063). Following a period of time for the filing of exceptions, the Assistant Secretary adopted the recommended decision and issued a final decision on July 25, 1974, which provided that reserve milk prices under the eight orders should be based solely on the M-W price.

Portions of the decision and proposed order amendments as were published in the Federal Register on July 31, 1974 (39 FR 27678) are reproduced on the following six pages.

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taining notice of the opportunity to file written exceptions thereto.

The material issues, findings and conclusions, rulings, and general findings of the recommended decision are hereby approved and adopted and are set forth in full herein.

The material issues on the record relate to:

1. The immediate need for making inoperative the butter-powder formula under each order during the next few months.

2. Appropriate longer-term basis of pricing reserve milk under the eight orders.

3. Whether an emergency exists to warrant the omission of a recommended decision.

Issues 1 and 3 were dealt with in an earlier decision (39 FR 11567). This decision deals with the remaining issue, No. 2.

FINDINGS AND CONCLUSIONS

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

Appropriate longer-term basis of pricing reserve milk under the eight orders. The reserve milk price (Class II milk in the Boston Regional, Connecticut, New York-New Jersey and Middle Atlantic orders and Class III milk in Eastern Ohio-Western Pennsylvania, Indiana, Ohio Valley, and Southern Michigan orders) should be based on the Minnesota-Wisconsin price for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as announced by the Department for the month.

The use of such price will maintain prices of reserve milk supplies at the highest level consistent with the orderly disposition of such milk and assure dairy farmers the full use value for that portion of their milk shipments not needed for Class I. Moreover, the use of the Minnesota-Wisconsin price as the reserve milk price in the eight markets, herein considered, will result in order prices for reserve milk comparable to prices being paid by processors of manufacturing grade milk in general. Finally, it will maintain alignment of reserve milk prices among the eight orders with other orders, most of which, effective August 1, 1974, will employ such pricing for reserve milk supplies.

Since mid-1968 in the four northeastern markets and for several years prior thereto in the other four markets, reserve milk has been priced at the lower of either the Minnesota-Wisconsin price or a butter-nonfat dry milk formula price. The Minnesota-Wisconsin price was the effective price in the eight orders for 32 of the 60 months during the 5-year period from 1969 through 1973.

Annually, the Minnesota-Wisconsin price and the butter-powder formula price have been in relatively close alignment. For instance, the Minnesota-Wisconsin price averaged 6 cents per hundredweight above the butter-powder formula price in 1968, 17 cents above in

1969, 10 cents above in 1970, 6 cents below in 1971, 2 cents above in 1972 and 7 cents above in 1973.

In the latter part of 1973 an unprecedented price gap developed between the level of the Minnesota-Wisconsin price and the butter-powder formula price. Until then the widest differences between the two prices were during October 1969 through April 1970 when the Minnesota-Wisconsin price varied from 31 to 42 cents over the butter-powder formula price. The Minnesota-Wisconsin price exceeded the butter-powder formula price by \$0.47, \$0.78, \$1.13, \$1.13, \$1.19 and \$0.73 for October, November and December 1973 and January, February and March 1974, respectively. In April 1974, due largely to a sharp decline in cheese prices with a continuing strong price structure for nonfat dry milk the relationship between the two price series reversed itself. For this month, the Minnesota-Wisconsin price was \$0.29 per hundredweight below the butter-powder formula price.

The wide divergence between the Minnesota-Wisconsin price and the butter-powder formula price that developed beginning in October 1973 prompted the various proposals relating to the pricing of reserve milk in the eight markets that were considered at the hearing.

Emergency interim action was taken on the hearing record to provide that during the period April 3 through July 1974 all reserve milk, except that used to produce butter and nonfat dry milk, be priced at the Minnesota-Wisconsin price. For milk used in butter and nonfat dry milk the price would be reduced by the amount not to exceed 50 cents per hundredweight, that the Minnesota-Wisconsin price exceeds the butter-powder formula price.

Accordingly, the issue remaining is the appropriate pricing of reserve milk after July 1974. The reserve milk pricing provisions in effect prior to April 3 will become operative August 1, 1974, except under the Indiana order, unless further amendment action is effected. The Indiana order has been amended effective August 1, 1974, on the basis of a separate proceeding involving several orders. Such amendments include use of the Minnesota-Wisconsin price as the reserve milk price.

The testimony adduced at the hearing centered primarily on the question of whether or not the butter-powder price formula in each of the eight orders should be deleted as an alternative basis in determining reserve milk prices. Both producers and handlers took diverse positions regarding this matter.

A national farm organization that has producer members in each of the eight

¹ This decision makes use of certain prices of butter, nonfat dry milk, and manufacturing grade milk for months beyond the dates for which such prices were available on the hearing record. For this purpose official notice is taken of the official price announcements of the market administrator, New York-New Jersey Federal order market for March through May 1974.

A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas. The hearing was held, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and the applicable rules of practice (7 CFR Part 900), at Washington, D.C. on February 20-28, 1974, pursuant to notice thereof issued on February 12, 1974 (39 FR 5642).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Associate Administrator, on June 21, 1974, filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision con-

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a large cooperative associated with the Middle Atlantic market, a large regional cooperative that has producer members in the Indiana and Southern Ohio markets, and a handler in the Boston Regional market, all proposed that the price for reserve milk be the Minnesota-Wisconsin price. In support of such proposal, they contended that the then effective reserve milk pricing formula (the lesser of the Minnesota-Wisconsin price or the butter-powder formula price) did not assure producers a reasonable return for reserve milk when market prices considered collectively for butter and nonfat dry milk are low relative to the Minnesota-Wisconsin price. They further contended that the butter-powder formula price did not reflect the value of other reserve milk products or the general economic factors affecting such products. Hence, they urged that the butter-powder formula price be eliminated to avoid the possibility of such product price depressing the price of all reserve milk and its accompanying adverse effect on uniform prices paid to producers. They pointed out, also, that the use of the Minnesota-Wisconsin price would maintain price alignment with other order and unregulated reserve milk prices.

Another regional cooperative, principally associated with the New York-New Jersey market, proposed that reserve milk prices be based on the Minnesota-Wisconsin price in each month except during the flush production months of April, May and June of each year. During such three months, reserve milk prices would be based on the lower of the Minnesota-Wisconsin price or the butter-powder formula price. This proponent contended that the retention of the alternative butter-powder price determinant was necessary to assure the availability of adequate butter-powder processing facilities for excess supplies in these markets during the flush production months.

Several of the principal cooperatives associated with the Eastern Ohio-Western Pennsylvania, Indiana and Ohio Valley markets proposed the adoption of the Minnesota-Wisconsin price as the price for all reserve milk except for that used to produce butter and nonfat dry milk. Under their proposal, reserve milk used in butter and nonfat dry milk would be priced each month at the butter-powder formula price. The basis of their proposal was that reserve milk should be priced at its actual use value. They held that the level of reserve milk prices had encouraged some milk to be associated with the orders under which they operate that is not always available for Class I use. They pointed out that this milk is sold to cheese plants at a price substantially higher than its value under the order prices when the butter-powder formula price is the effective price. The need for pricing milk utilized in butter and powder at the butter-powder formula price, they contended, is necessary to accommodate the orderly disposition of the seasonal and weekend excess milk

at plants processing butter and nonfat dry milk.

Certain other cooperatives associated primarily with the New York-New Jersey, Boston Regional and/or Connecticut markets proposed that milk utilized in other than butter and nonfat dry milk production be priced on the simple average of the Minnesota-Wisconsin price and butter-powder formula price. Under their proposal, reserve milk utilized in butter and skim milk powder would be priced at the lower of the butter-powder value or Minnesota-Wisconsin price. Other cooperatives associated with the Southern Michigan market supported a similar reserve milk pricing formula but held that the average of the Minnesota-Wisconsin price and the butter-powder formula price should not result in a price lower than the butter-powder formula price. With respect to pricing milk used in butter and powder production, the Southern Michigan group proposed use of the butter-powder formula price.

In support of these latter reserve milk pricing proposals, proponents stated, generally, that there are significant differences in the competitive position of, and demand for, products made from reserve milk. Handlers prefer to use quantity milk on a regular basis for certain manufactured products such as cottage cheese and ice cream. Proponents contended that the price of reserve milk used in such products should reflect, to the extent possible, the costs associated with attracting an adequate supply of such milk. Conversely, they pointed out that other products that are made from residual supplies of reserve milk compete in a national market with such products made from manufacturing grade milk and thus the value of reserve milk used in such products is lower. It was their contention that the proposal to base reserve milk prices on the average of the Minnesota-Wisconsin and butter-powder formula prices reflects the overall value of the mix of products made from reserve milk. The price applicable to milk used in butter and powder production, they contended, should basically reflect the net value that can be realized by producer organizations that are handling reserve milk supplies in connection with performing the Class I balancing function. These proponents further stated that the retention of the butter-powder formula is essential to the maintenance of needed manufacturing outlets for processing excess milk from cooperatives performing the Class I balancing function.

The national organization representing dairy cooperatives proposed the adoption of separate pricing formulas for reserve milk used in cheese and butter-powder production based on the yield factors and "make allowances" employed by the Department under the dairy price support program. Adoption of this limited proposal, it was contended, would (1) provide needed additional compensation to handlers—principally cooperatives—to offset the costs they incur in performing balancing services to the market and

(2) return to farmers a price reflecting the full use value of milk made into cheese, butter and powder.

Certain individual handlers associated with the Boston Regional and New York-New Jersey markets proposed that the present "make allowance" of 48 cents contained in the butter-powder price formula be increased to 72 cents per hundredweight. They contended that the present 48 cents "make allowance" should be adjusted to reflect the increase in costs of receiving and processing reserve milk that has occurred since adoption of the product price formula in July 1968.

A regional association of ice cream manufacturers, a processing cooperative associated with the Middle Atlantic market, and a group of Ohio handlers testified in support of retaining the present reserve milk pricing formula. They were particularly opposed to the removal of the butter-powder price formula from the eight orders under consideration. Its elimination, they contended, would (1) result in reserve milk prices at levels which would deter the disposition of such milk through normal market channels; (2) have an adverse effect on consumer prices and acceptability of certain manufactured dairy products; (3) result in competitive inequities between regulated and unregulated handlers; and (4) base reserve milk prices solely on the Minnesota-Wisconsin price series which they held is not an appropriate price determinant for reserve milk. Moreover, they strongly urged that no action be taken as a result of these proceedings and recommended that another hearing be called to consider the propriety of using the Minnesota-Wisconsin series as a basis in determining class prices under the orders.

Substantial quantities of reserve milk used to produce manufactured dairy products are associated with the eight orders. During the past three years (1971, 1972 and 1973) the annual volume of reserve milk supplies priced under the eight orders ranged from 11 to 13 billion pounds. Such reserve supplies represented about 45 percent of the total volume of reserve milk priced under all Federal milk orders. Moreover, nearly 40 percent of the reserve supplies in the eight markets is produced during the 4-month period, April-July.

A substantial part of the reserve milk associated with the eight orders is used in the manufacture of the so-called "soft products"—principally cottage cheese, frozen desserts, and condensed products. This "soft products" use of reserve milk constitutes a more regular outlet on a year-round basis than the storable manufactured products such as hard cheeses, butter and nonfat dry milk. The use of reserve milk in the manufacture of the storable products is more seasonal in nature and thus is somewhat greater in the flush production months than in other months of the year.

In 1973, about 65 percent of the reserve milk supplies in five of the eight markets—Boston, Eastern Ohio-Western

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Pennsylvania, Indiana, Ohio Valley and Southern Michigan—was utilized in the production of "soft products". During the 12-month period ending May 31, 1973, about 80 percent of the volume of reserve milk associated with the New York-New Jersey order was utilized in manufactured products other than hard cheese and butter-powder. Comparable data for the Middle Atlantic and Connecticut orders were not available on the record.

About 38 percent of the reserve milk supplies in the eight markets, herein considered, is priced under the New York-New Jersey order. The monthly volume of reserve milk in this market during the 12-month period ending May 31, 1973, ranged from a low of 300 million pounds in November to a high of 535 million pounds in June. Notwithstanding this relatively wide variation, the volume of reserve milk utilized in butter and powder in June was only one-third of total reserve milk usage.

In pricing reserve milk in each of the eight markets to carry out the objectives of the statute authorizing milk orders, prices should be established at the highest level possible compatible with the orderly disposition of such milk. The reserve milk price, in conjunction with the price for other uses of milk under the orders, should result in uniform prices high enough to attract the needed milk supplies. The effect of a reserve milk price less than the highest practicable level is to shift to consumers of fluid milk a greater burden in providing the price incentive to attract the necessary milk supply. In effect, consumers of fluid milk would subsidize consumers of manufactured products. On the other hand, if reserve milk is priced too high in relation to competitive free market prices handlers may not accept milk in excess of actual fluid needs and thus chaotic market conditions may prevail as homeless milk competes for market outlets.

An important factor that must be considered in pricing reserve milk is that the competitive market for products manufactured from reserve milk is with products made from unregulated manufacturing grade milk. It is essential, therefore, that Federal order prices for reserve milk be maintained at levels comparable with prevailing competitive pay prices for manufacturing grade milk at plants buying such milk.

The Minnesota-Wisconsin price is a representative pay price reflecting the prices paid to producers in the two-State area wherein about 13 billion pounds or approximately half the total manufacturing grade milk in the United States is produced. It reflects prices paid at the farm level under competitive conditions for manufacturing grade milk used in the major manufactured dairy products. The price is highly responsive to supply and demand conditions for such products that are sold within a marketing system that is national in scope.

The Minnesota-Wisconsin price series is published monthly by the Statistical Reporting Service of the Department and represents an estimate of the prices paid

in these two States for manufacturing grade milk based on reports from 350 plants. In 1972, this two-State average price reflected a weight of about 56 percent for Wisconsin prices and 44 percent for Minnesota prices. These weights represent the proportions of the total volume of manufacturing grade milk purchased from farmers in the respective States.

The two-State price average reflects prices paid for milk used in different manufactured products at plants buying such milk. In 1972, butter and by-product plants accounted for 43 percent of all manufacturing grade milk in Minnesota. Cheese plants accounted for 20 percent and plants manufacturing varied products accounted for the remaining 37 percent.

In Wisconsin, plants used the following proportions of manufacturing grade milk in 1972 according to type of plant: cheese, 85 percent; butter and by-products, 5 percent; and condenseries and varied products, 10 percent.

Each year, the Statistical Reporting Service publishes the results of a comparison of the Minnesota-Wisconsin price with the average price reported paid at all manufacturing plants in the two States (nearly 750 plants). Official notice of the 1973 release of these data was taken at the hearing. This release showed that for the three years 1970 through 1972 monthly reported Minnesota-Wisconsin prices averaged 1.1 cents per hundredweight below what was actually paid.

Close surveillance of the Minnesota-Wisconsin price series is maintained by the Statistical Reporting Service and the Agricultural Marketing Service to assure continued reliability of the series. Investigations bearing on criticisms voiced about the reliability of the series have been undertaken. For example, a number of years ago it was alleged that the reported Minnesota-Wisconsin price overstated prices actually paid because of butterfat testing practices at dairy plants. A study directed at answering this criticism was undertaken by the University of Minnesota, the University of Wisconsin, and the Department of Agriculture of the two States. A copy of this study, released in 1968, was entered into the hearing record. It concluded that the average "overstatement" of milk prices, because of understating butterfat test was 4.1 cents per hundredweight, but this was virtually offset by hauling subsidies that resulted in an understatement of 1.4 cents per hundredweight in reported prices, and cash dividends that resulted in an understatement of 2.1 cents per hundredweight in reported prices for the two States combined.

More recently it has been alleged that the Minnesota-Wisconsin price overstates the value of manufacturing milk because dual-intake plants (receiving both manufacturing grade and milk eligible for fluid markets) are included in the sample and Grade A proceeds are used to subsidize manufacturing grade milk operations. To provide the facts of the situation, special tabulations for 1970

and 1973 were made by the Statistical Reporting Service. Such tabulations show that Grade B plants paid slightly higher average prices for manufacturing grade milk than did dual-intake plants. Grade B plants in Minnesota paid an average of 2 cents more per hundredweight than dual-intake plants both in 1970 and 1973. In Wisconsin, Grade B plants paid an average of 5 cents more in 1970 and 1 cent more in 1973 than was paid for manufacturing grade milk at dual-intake plants. (The 1970 tabulations were entered into the hearing record, but both the 1970 and 1973 tabulations are shown in Supplement No. 1 to the April 14, 1974, issue of Agricultural Prices, official notice of which is taken.)

The allegations made on the record challenging the validity of the Minnesota-Wisconsin price series as a proper determinant of manufacturing milk values are unfounded. Moreover, because the Minnesota-Wisconsin price is a free market pay price resulting from competitive bidding among unregulated processors for milk for various manufacturing uses, it is the best measure available of changes in the value of milk for manufacturing.

The Minnesota-Wisconsin price is the sole basis (effective August 1, 1974) of pricing milk in the lowest price class under 48 of the 53 Federal milk orders in effect outside the northeastern markets. The 39-market uniform classification and pricing decisions (39 FR 8202 and 8452) adopted the Minnesota-Wisconsin price as the reserve milk price. These decisions provided a continuation of the Minnesota-Wisconsin price as the reserve milk price in 24 markets and expanded its use to 15 additional markets. The five markets, outside the Northeast, which use the Minnesota-Wisconsin price as an alternative price for reserve milk rather than the sole basis of pricing such milk are in the western part of the country; namely, Black Hills, Western Colorado, Inland Empire, Puget Sound and Oregon-Washington. Therefore, use of the Minnesota-Wisconsin price for reserve milk pricing in the northeastern markets would result in uniform pricing of virtually all reserve milk priced under Federal milk orders except for the Pacific Northwest States, since only a very small quantity of reserve milk is priced under the Black Hills and Western Colorado orders.

Use of the Minnesota-Wisconsin price will assure closer alignment of reserve milk prices between three-class use markets and two-class use markets. The Eastern Ohio-Western Pennsylvania, Ohio Valley and Southern Michigan orders provide an intermediate classification (Class II) for cream products, cottage cheese, yogurt, and milk disposed of to commercial food processors. A similar intermediate class of use is provided under the Indiana order as well as under the other Federal orders amended on the basis of the "39 market classification decision" (effective August 1974). The price for such intermediate class in these markets is the Minnesota-Wisconsin

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such order plants are not faced with competition in procurement since the operation of the pool's equalization fund enables them to pay the uniform price rather than actual use value to producers. Nonregulated processors do not have this advantage. Rather they must pay whatever price is necessary to obtain milk supplies. It is essential, therefore, that to maintain competitive equality between regulated and unregulated processors of manufactured products, reserve milk prices under the orders be closely aligned with the farm prices paid by unregulated plants in the manufacturing industry.

Certain proponents urged that the reserve milk price reflect the supply balancing costs of cooperatives which result from irregular volumes of reserve milk processed at cooperative-owned manufacturing plants. In performing the balancing function of tailoring milk supplies to other handlers, a cooperative incurs various costs. These costs vary according to each handler's procurement practices receiving such service. A handler that regularly accepts the total production of a given number of producers incurs the cost of balancing. Conversely, in the case of a handler who orders from a cooperative exact quantities based on needs, the cooperative incurs the cost of balancing. Balancing costs, to a large degree, are related to the quantity of milk produced and the demand for Class I use. A substantial portion of the costs incurred in balancing is in serving the Class I market. Therefore, such costs appropriately should be reflected in a service charge to the handler receiving the balancing supply service and should not be reflected in a lower price to producers. The record indicates that cooperatives follow the practice of assessing a handling charge.

A reserve milk price based on the average of the Minnesota-Wisconsin and butter-powder formula prices would establish excessive weight in the formula on the value of milk used to produce butter and powder. This is because, as stated hereinbefore, the Minnesota-Wisconsin price reflects in part prices paid for milk used in the production of butter and nonfat dry milk.

As previously noted, various proprietary handlers and operating cooperatives in the Northeast proposed that the basis of pricing reserve milk should continue the "whichever is lower" concept. The continuance of this concept was necessary, they strongly urged, in order to accommodate the complete disposition of distress reserve milk supplies at times when the competitive pay prices for manufacturing grade milk are too high in relation to the market values of butter and powder.

Certain parties in their briefs contended that the dairy product price relationships which existed at the time of the hearing had changed substantially subsequent to the hearing. Those parties requested that in the event the Department should consider changing the pricing provisions for reserve milk on a long-

term basis as a result of this hearing, that the hearing should be reopened to permit taking of additional evidence. Official notice has been taken of the official price announcements of the Market Administrator of the New York-New Jersey Order No. 2 for the months of March through May 1974 by which these changing dairy product price relationships are demonstrated, and there would accordingly be no need to reopen the hearing to receive such evidence. Even though the dairy product price relationships have changed, the circumstances which prompted the hearing could arise again if the order were not appropriately amended. The problem of interorder price relationships and continuing alignment of Federal order reserve milk prices with unregulated manufacturing milk values can be assured only through the type of action herein taken. Conceivably, market conditions could change for brief periods to an extent which warrant a lower price for certain uses of reserve milk. In such circumstances, the amendment hearing procedure offers an appropriate means of accommodating such exceptional market situations.

The reserve milk prices in the Boston Regional, Connecticut, Middle Atlantic and New York-New Jersey orders are adjusted seasonally. Generally, the amount of such adjustments range from a minus 12 cents in May to a plus 12 cents per hundredweight in the fall months; and, on an annual basis, the minus adjustments are offset by plus adjustments. The purpose of such adjustments is to encourage handlers to make milk more readily available for fluid use in the short production months and to facilitate the orderly disposition of excess reserve milk supplies in the flush production months. Such seasonal adjustments provide some interregional price disparity; however, the record does not indicate that the seasonal adjustments have led to any interregional problems in marketing of the reserve milk supply.

RULINGS ON PROPOSED FINDINGS AND CONCLUSIONS

Briefs and proposed findings and conclusions were filed on behalf of certain interested parties. These briefs, proposed findings and conclusions and the evidence in the record were considered in making the findings and conclusions set forth above. To the extent that the suggested findings and conclusions filed by interested parties are inconsistent with the findings and conclusions set forth herein, the requests to make such findings or reach such conclusions are denied for the reasons previously stated in this decision.

On the record of the hearing, separate motions were presented to the Administrative Law Judge that (1) the scope of the hearing be broadened to consider the proposed revision of all classification provisions of the orders, as well as to include the proposed revision of many additional Federal milk orders; and (2) the Department provide information

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during the hearing as to the identity, type of operation, and market outlet of products processed by plants handling manufacturing grade milk in the States of Minnesota and Wisconsin. The motions were denied.

In post-hearing briefs, it was requested that consideration be given to a reversal of the rulings.

The Administrative Law Judge's rulings have been reviewed in light of the arguments presented. The rulings, for the reasons stated by the Administrative Law Judge on the record, are hereby affirmed.

Requests were also contained in post-hearing briefs that the hearing be reopened for the taking of additional evidence. For the reasons heretofore stated, such requests are denied.

GENERAL FINDINGS

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders, except Indiana, and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determination set forth herein.

The following findings are hereby made with respect to each of the aforesaid tentative marketing agreements and orders, except Indiana:

(a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determine pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the tentative marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in a marketing agreement upon which a hearing has been held.

RULINGS ON EXCEPTIONS

In arriving at the findings and conclusions, and the regulatory provisions of this decision, each of the exceptions received was carefully and fully considered in conjunction with the record evidence. To the extent that the findings and conclusions, and the regulatory provisions of this decision are at variance with

any of the exceptions, such exceptions are hereby overruled for the reasons previously stated in this decision.

In exceptions to the recommended decision, certain requests were made to either take no amendatory action or reopen the hearing for the purpose of taking evidence on market developments subsequent to the close of the hearing. Other exceptions purported to discredit the Minnesota-Wisconsin price as a viable price under the orders and requested that further and more extensive hearings be held on the appropriateness of the Minnesota-Wisconsin manufacturing grade milk price as a price mover under the orders.

Such requests would result, effective August 1, 1974, for an indefinite period, in the orders reverting to the respective prehearing provisions that price milk for manufacturing use on the basis of the lower of the Minnesota-Wisconsin price or the butter-powder formula price. In this circumstance, the requests are inconsistent in that they would continue the use of the Minnesota-Wisconsin price when it is lower than the butter-powder formula price. Such requests, therefore, are essentially directed to the level of price.

In support of requests to reopen the hearing, the exceptors point out that the relationship of the Minnesota-Wisconsin price and the butter-powder formula price has reversed since March 1974 and, thus, the Minnesota-Wisconsin price has been the effective price mover under the orders. Such exceptors, however, did not contend that the Minnesota-Wisconsin price was inappropriate for use under the orders in those months that it is lower than the butter-powder formula price.

Under these circumstances, the request would merely result in retaining the butter-powder formula price "snubber" which, for the reasons hereinbefore stated, should no longer be retained as a long term pricing provision under the orders. Accordingly, the requests to reopen the hearing are denied.

With respect to the request to hold further and more extensive hearings on the appropriateness of the Minnesota-Wisconsin price as a price for milk used for manufacturing purposes, exceptor does not question the use of such price as the sole price mover for Class I milk under the orders. Moreover, since all Federal milk marketing orders employ the Minnesota-Wisconsin price as a Class I price mover, and it has essentially uniform application in pricing Class II and III milk, any further review of the validity of such price for use under orders would of necessity involve all milk orders. Such request, therefore, is much broader than the limited scope of this hearing on the appropriate pricing of milk for manufacturing use in light of the 61 Federal order markets. Exceptor does not provide any indication that a better alternative price mover than the Minnesota-Wisconsin price is available. Therefore, it cannot appropriately be concluded from exceptions that this pro-

ceeding should be further continued or made more extensive. Moreover, as previously stated, we must have reasonable price coordination between the Federal milk orders, which will be enhanced by the action concluded herein to be needed. Accordingly, such request is hereby denied.

MARKETING AGREEMENT AND ORDER

Annexed hereto and made a part hereof are two documents, a marketing agreement¹ regulating the handling of milk, and an ORDER amending the orders regulating the handling of milk in the aforesaid specified marketing areas, except Indiana, which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

It is hereby ordered, That this entire decision, except the attached marketing agreement, be published in the FEDERAL REGISTER. The regulatory provisions of the marketing agreement are identical with those contained in the orders as hereby proposed to be amended by the attached order which is published with this decision.

DETERMINATION OF PRODUCER APPROVAL AND REPRESENTATIVE PERIOD

March 1974 is hereby determined to be the representative period for the purpose of ascertaining whether the issuance of the order, as amended and as hereby proposed to be amended, regulating the handling of milk in the aforesaid specified marketing areas, except Indiana, is approved or favored by producers, as defined under the terms of each of the orders as amended and as hereby proposed to be amended, who during such representative period were engaged in the production of milk for sale within the respective marketing areas.

Signed at Washington, D.C., on: July 25, 1974.

RICHARD L. FELTNER,
Assistant Secretary.

Order² amending the orders, regulating the handling of milk in certain specified marketing areas:

FINDINGS AND DETERMINATIONS

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of each of the aforesaid orders, except Indiana, and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict

¹ Marketing agreement filed as part of the original document.

² This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

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with the findings and determinations set forth herein.

The following findings are hereby made with respect to each of the aforesaid orders, except *Littona*:

(a) *Findings*. A public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the aforesaid specified marketing areas. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and the applicable rules of practice and procedure (7 CFR Part 900).

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, and the minimum prices specified in the order as hereby amended, as such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The said order as hereby amended regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

Order relative to handling. It is therefore ordered that on and after the effective date hereof the handling of milk in each of the specified marketing areas shall be in conformity to and in compliance with the terms and conditions of each of the orders, as amended, and as hereby amended, as follows:

The provisions of the proposed marketing agreements and order amending each of the specified orders contained in the recommended decision issued by the Associate Administrator on June 21, 1974, and published in the FEDERAL REGISTER on June 26, 1974 (39 FR 23063) shall be and are the terms and provisions of this order, amending the orders, and are set forth in full herein.

PART 1001—MILK IN THE BOSTON REGIONAL MARKETING AREA

1. In § 1001.61 paragraph (b) is revised as follows:

§ 1001.61 Class prices.

(b) *Class II price*. Subject to the adjustment set forth below for the applicable month, the Class II price shall be the basic formula price for the month.

Month:	Amount
January	+\$0.03
February	+.03
March	-.05
April	-.09
May	-.12
June	-.11
July	+.03
August	+.10
September	+.08
October	+.06
November	+.06
December	+.06

§ 1001.64 [Amended]

2. In § 1001.64, paragraph (j) is revoked.

PART 1002—MILK IN THE NEW YORK-NEW JERSEY MARKETING AREA

1. In § 1002.50a paragraph (c) is revised as follows:

§ 1002.50a Class prices.

(c) Subject to the adjustment set forth below for the applicable month, the Class II price shall be the basic formula price for the month.

Month:	Amount
January	+\$0.03
February	+.02
March	-.05
April	-.09
May	-.12
June	-.11
July	+.03
August	+.10
September	+.08
October	+.06
November	+.06
December	+.06

2. In § 1002.70, paragraph (f) is revoked and the introductory text of the section is revised as follows:

§ 1002.70 Net pool obligation of handlers.

Each handler's net pool obligation for milk received at each plant and unit shall be computed separately pursuant to paragraphs (a) through (d) of this section and then combined into one total to be adjusted by any credit applicable pursuant to paragraph (e) of this section to determine the handler's total net pool obligation.

(f) [Revoked]

PART 1004—MILK IN THE MIDDLE ATLANTIC MARKETING AREA

1. In § 1004.50 paragraph (b) is revised as follows:

§ 1004.50 Class prices.

(b) *Class II price*. Subject to the adjustment set forth below for the applicable month, the Class II price shall be the basic formula price for the month.

Month:	Amount
January	+\$0.05
February	+.04
March	-.03
April	-.07
May	-.10
June	-.09
July	+.05
August	+.12
September	+.08
October	+.08
November	+.08
December	+.08

§ 1004.60 [Amended]

2. In § 1004.60 paragraph (f) is revoked.

3. In § 1004.61 paragraph (b) (1) (i) is revised as follows:

§ 1004.61 Computation of weighted average price and uniform prices for base milk and excess milk.

(b) . . .
(1) . . .

(i) Multiply the quantity of such milk which does not exceed the total quantity of producer milk received by such handlers assigned to Class II milk by the Class II milk price less 5 cents;

14. An order amending the eight milk orders, implementing the use of the M-W Class II/III pricing formula, was issued by the Assistant Secretary on August 21, 1974 (39 FR 30925), after approval of producers engaged in the production of milk for sale in the respective marketing areas. Such pricing formula became effective October 1, 1974 in the eight milk orders.

Conclusions

All of the contentions of the parties in this proceeding have been considered whether or not specifically mentioned in these conclusions.^{6/} The ten petitioners herein have presented a myriad of challenges to both the partial emergency and long-term decisions and orders of the Assistant Secretary. The challenges are summarized as follows:

^{6/}In proceedings pursuant to Section 8c(15(A) of the Act, petitioners have the burden of proving that the action of the Secretary is not in accordance with law. In re Boonville Farms Cooperative, Inc., 23 A.D. 383, aff'd Boonville Farms Cooperative, Inc., v. Freeman, 23 A.D. 1330 (N.D.N.J. 1964), aff'd 358 F.2d 681 (CA 2 1966); In re Andrew W. Leonberg, 32 A.D. 763, 791-798; U.S. v. Mills, 315 F.2d 828, 835 (CA 4, 1963), cert. den. 375 U.S. 819.

1. Insufficient notice of hearing and inadequate record evidence to support the Assistant Secretary's two decisions and orders. With respect to the emergency procedures, failure to issue a recommended decision with opportunity to file exceptions, and failure to provide a 30 day notice of the effective date of the order amendments.
2. Inadequacy of the M-W series and failure to produce detailed information on the M-W series.
3. Failure to produce copies of the 39 order decision prior to publication in the Federal Register.
4. The amendments violated numerous sections of the Act, i.e. 7 U.S.C. Sections 602 (2), 608c(5)(A), 608c (11)(A), (C).

On the basis of the record evidence in this proceeding and upon consideration of the numerous authorities cited in the briefs of the parties, we hold that the actions of the Assistant Secretary, complained of herein, are all in accordance with law. The reasons supporting this conclusion are contained in the preceding findings of fact and in the following comments.

I

Procedural Matters

Petitioners' allegation that the Secretary of Agriculture violated Section 608c(3) of the Act by failing to give due notice of and opportunity for a hearing, is without merit. The notice was issued February 12, was published February 14, 1974, and the hearing began on February 20, 1974. As provided in 7 CFR 900.4(a) of the Rules of Practice governing the conduct of amendment hearings under the Act:

... in the case of hearings on amendments to marketing agreements or marketing orders, the time of the hearing may be less than 15 days but shall not be less than 3 days after the date of the publication of notice in the Federal Register.

Likewise Section 608c(17) of the Act provides for 3 days notice for amendments to federal orders.

The Secretary's decision to call an amendment hearing on 5 days notice was deemed sufficient in Ideal Farms, Inc. v. Benson, 181 F. Supp. 62 (D.C. N.J. 1960) affirmed, 288 F.2d 608, cert. denied 372 U.S. 965. See also Carnation Co. v. Butz, 372 F.Supp. 883, 889 (D.D.C. 1974) where the Court urges the Secretary's use of the three day notice period contained in Section 8c(17) of the Act in preference to other means of expedited action.

There was evidence (R. pp. 25-26, 946) that some of these petitioners were also notified by mail from the Market Administrator's Office that an amendment hearing was forthcoming as early as February 4, 1974. The fact that all of the petitioners entered their appearances through counsel or other representatives at the hearing and participated extensively, nullifies their contention that the published notice did not provide them sufficient notice. As stated in United States v. Wrightwood Dairy Co., 127 F.2d 907, 910 (CA 7, 1942) regarding adequate notice under 7 U.S.C. 608c(3): "if the purpose of the hearing was clear, and everyone knew of the general considerations, no more was needed."

Petitioners further urge that the Secretary's decision to issue the temporary amendment on an emergency basis omitting a "recommended or tentative decision"; opportunity to submit exceptions to that tentative decision; and the normal 30-day period between publication and effective date, violated procedural requirements of 5 U.S.C. §§557(b), 557(c)(2) and 553(d).

However 5 U.S.C. 557(b)(2) clearly states with respect to a recommended decision:

"This procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires."

In regard to the requirement of publication 30 days prior to the effective date, it is provided in 5 U.S.C. §553(d)(3) that such publication may be omitted for "good cause found and published with the rule." The Secretary of Agriculture, upon consideration of the evidence submitted at the hearings held between February 20, and 28, 1974, found and stated in his decision of March 27, 1974, as follows:

The due and timely execution of the function of the Secretary under the Act imperatively and unavoidably requires the omission of a recommended decision and opportunity for exceptions thereto on issue No. 1 [the immediate need for making inoperative the b-p formula]. The current marketing conditions in the aforesaid marketing areas are such that it is urgent that remedial action be taken as soon as possible. It is necessary to correct at the earliest opportunity the disparity in alignment of reserve milk prices under the 8 orders with the order prices in the midwest as well as the prices being paid for manufacturing grade milk. Accordingly, requests for the recommended decision are denied.

Petitioners attack this finding on the grounds that it is not sufficient for the Secretary to merely paraphrase statutory requirements in his decision and cite for authority Willow Farm Dairies, Inc. v. Freeman, 206 F. Supp (D. Md. 1962). That case, under the caption United States v. Mills, 315 F.2d 828, 833 (CA 4 1963) cert. den. 375 U.S. 819 was reversed and the Court specifically stated that as long as the Secretary's decision had firm basis in the record, the mere fact that it

paraphrased statutory language will not invalidate it. Here, however, the Secretary's decision, of March 27, 1974, did in fact fully discuss the evidence submitted at the hearing which demonstrated the existence of an emergency. See Finding of Fact 11. p. 22

Finally there was full compliance with the requirements of the Administrative Procedure Act, (5 U.S.C. 556(e)) and Section 900.8(d)(5) of the Department's rules of practice when official notice of official governmental publications was taken in the recommended decision of June 21, 1974. This provided all parties, including the petitioners an opportunity to review such material and to show that such facts were inaccurate or erroneously noticed prior to the final decision of July 25, 1974.

The Record Evidence

The hearing record of February 20-28 contains a variety of testimony in support of each of the several categories of proposals noted in Finding of Fact 7 as well as opposition testimony. Likewise the briefs and exceptions filed after the hearing seek to persuade the deciding authorities of the merits or defects of each proposal. While many of the proposals, other than the amendments adopted, appear meritorious in the context of the record evidence. Simple average of the M-W and b-p prices; use of the b-p in full production periods, etc) we

nevertheless find adequate and substantial record evidence to support the Assistant Secretary's decisions (Findings 11 and 13).

Beginning in October, 1973, while milk throughout the country was in short supply, a wide disparity developed between the M-W and the b-p prices. Accordingly, in the eight milk orders involved in the February hearing the reserve milk (Class II or III) was priced ^{8/} at the lower b-p price and was substantially below the M-W price as indicated by the following:

October 1973	\$.47
November	.78
December	1.13
January 1974	1.18
February	1.19

In view of this significant disparity between what was formerly consistent pricing mechanisms and upon the request of several industry groups, the Assistant Secretary of Agriculture convened an emergency hearing and thereafter issued his decision in response thereto.

At the hearing, the Secretary received evidence stressing the need for immediate action to make inoperative the b-p formula, such as:

- (a) the gross and wide differences which had developed since October 1973 in the 8 markets between actual reserve milk prices based on the b-p formula and

^{8/}Hereafter "Class II price" also refers to "reserve milk price," or "Class II/III price".

- the M-W price (R. pp. 196-204, Ex. 12);
- (b) under the b-p price, dairy farmers were not receiving returns for milk used for manufactured products reflective of the competitive market value of either the milk or the milk products (R. pp. 277-303, Ex. 14);
- (c) there was a continuing decrease in the amount of milk being produced in Vermont as a result of increases in production costs and inability to obtain sufficient returns on the sale of milk to cover such costs. (R. pp. 357-364);
- (d) need for immediate action (R. pp. 45-73, 247-253, 265-272, 716-724, 1049-1075).

The record evidence also stressed the need to relate the price for reserve milk to the M-W price instead of the b-p price (Finding of Fact 8).

In view of the record evidence, the Assistant Secretary's determination to amend the eight orders, (1) on an emergency basis, and (2) to relate the price of reserve milk to the M-W price, was fully supported by such evidence and in accordance with Section 8c(3) and (4) of the Act.

Additionally the Secretary was aware (R. pp. 138-140) that 39 other milk orders were being amended to determine the Class II price solely on the basis of the M-W price. Based upon this fact the Secretary was fully supported in his determination (in the temporary and permanent amendment decisions) to prevent disruption of normal marketing channels through alignment of the price for reserve milk in each of the 8 Northeastern order areas with the prices that applied under all other Federal orders and with the prices unregulated plants in Minnesota and Wisconsin were paying for manufacturing grade and surplus milk. Price alignment is a legitimate concern of the Secretary of Agriculture and a proper exercise of his functions. Sunny Hill Farms Dairy Co., Inc. v. Hardin, 446 F.2d 1124 (CA-8, 1971).

II

Use of the M-W Price Series as a Pricing Standard

Petitioners urge they have been denied procedural due process by the Department's refusal to provide them certain data concerning the makeup of the M-W price, and that without this information they were

unable to properly participate in the amendment hearing of February 20-28, 1974. A rulemaking hearing under the Act is governed by the Rules of Practice appearing in 7 CFR Part 900 and the Administrative Procedure Act (5 U.S.C. 551 et seq.) and there is no provision for general discovery in such rulemaking proceeding. Therefore the Administrative Law Judge presiding at the February hearing was correct in his ruling that he could not halt the hearing for the assemblage by the Department of Agriculture of data considered desirable by certain participants for use at the hearing. (R. pp. 186-192) Rulemaking hearings are conducted to permit various proponents and opponents of given proposals to come forward to bring to the Secretary's attention such information as they may have, and not to elicit information from the Secretary or the various parties participating in the proceeding. United States v. Wrightwood Dairy Co., 127 F.2d 907 (CA 7, 1942).

Furthermore, the Administrative Procedure Act, (5 U.S.C. 551 et seq.) clearly provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The Department of Agriculture is a neutral party in rulemaking proceedings. It is not required to provide data in support or in opposition to any proposal,

nor is it obligated to introduce evidence to explain the make up of the M-W series. Rights petitioners may have to demand information as to the confidential details of the M-W price under statutes such as the Freedom of Information Act, do not include the right to delay an emergency hearing. The rulings by Administrative Law Judge (R. pp. 191-192) were sound and fully supported by controlling law. Further we believe the Secretary has undertaken to fully answer all of the questions posed by Lehigh's requests of February 22 and March 11, 1974 (15-a, Lehigh Exhibits 1, 2, 3, 3a; R. Ex. 33, 34).

During the course of the July 15-a hearing, counsel for the nine Order No. 2 petitioners sought to introduce into evidence at that hearing the deposition of one Dwight Morris dated May 31, 1974. The gist of the deposition was that the M-W series price was "rigged" or manipulated to yield a higher price through payments by certain plants in excess of normal producer pay prices in Minnesota and Wisconsin. The deposition, since it was dated May 31 and was subsequent to the rulemaking hearing of February, was ruled inadmissible by me

at the July 1974 hearing^{7/}. The reasons in support of the ruling appear at pages 58 through 69 of the 15-a transcript, to the effect that the Secretary's decisions must be judged solely on the rulemaking record evidence. U. S. v. Mills, supra., 315 F.2d at page 836.

Subsequent to the July 1st 15-a hearing, but prior to the Secretary's issuance of his long-range pricing decision, exceptions were filed on July 11, 1974 on behalf of the nine Order No. 2 petitioners in the rulemaking proceeding. Attached to the exceptions was the deposition of Dwight Morris, offered (page 8) as new matter "which would materially alter the assertions made in the Recommended Decision [of June 21, 1974 - Finding of Fact 13]." Further exception was taken to the failure of the Recommended Decision to call for additional hearings to analyze the relative performance of the M-W and b-p formulas following the date of the February hearing.

^{7/} Counsel for the nine Order No. 2 petitioners requested certification of this ruling at page 18 of its 15-a brief of August 7, 1974. Since this issue was no more compelling than any other issue in this proceeding, no immediate action was taken. The ruling can be reviewed now in the context of the whole proceeding, rather than in isolation at the earlier stage suggested by counsel.

In accordance with my order of November 12, 1974, all briefs and exceptions filed, including petitioners', are here for review in connection with the rulemaking proceeding, along with an affidavit of Robert W. March, filed on October 1, 1974 in rebuttal to the Morris deposition.

The March affidavit satisfactorily refutes any implication of M-W manipulation. Said affidavit states: that the M-W price series is based upon reports from a large number of plants; that higher prices paid at a small group of plants would have little if any influence on the average price for manufacturing grade milk in the states of Minnesota and Wisconsin; that the Department was apprised of the intent to pay a price in excess of the prevailing average value of milk for manufacturing in 16 out of a total of 754 plants; that the prices were monitored closely; and that the prices paid by the 16 plants were within the range of prices paid by other plants and had no significant impact on the M-W price.

The exception filed by petitioners were also considered by the Assistant Secretary when he issued his final decision on July 25, 1974.
(Finding of Fact 13)

In his rulings on exceptions the Assistant Secretary stated
in part:

"In exceptions to the recommended decision, certain requests were made to either take no amendatory action or re-open the hearing for the purpose of taking evidence on market developments subsequent to the close of the hearing. Other exceptions purported to discredit the Minnesota-Wisconsin price as a viable price under the orders and requested that further and more extensive hearings be held on the appropriateness of the Minnesota-Wisconsin manufacturing grade milk price as a price mover under the orders.

Such requests would result, effective August 1, 1974, for an indefinite period, in the orders reverting to the respective prehearing provisions that price milk for manufacturing use on the basis of the lower of the Minnesota-Wisconsin price or the butter-powder formula price. In this circumstance, the requests are inconsistent in that they would continue the use of the Minnesota-Wisconsin price when it is lower than the butter-powder formula price. Such requests, therefore, are essentially directed to the level of price."

The Assistant Secretary's observation that the exceptions were essentially directed at the level of price rather than the efficacy of the M-W price is supported by the record evidence. Basically petitioners want a continuation of the earlier order provisions which priced milk at the lower of the M-W or b-p price. No alternative to the M-W price was proposed or even suggested (15-a Tr. pp. 108-109), No challenge was made to other order provisions which are structured upon the M-W price series (e.g. the price of Class I milk), nor is there a challenge to the use of the M-W price as the effective price determinant for Class II milk under the orders prior to their amendment at those times when the b-p formula did not apply.

The nine Order No. 2 petitioners, as handlers under the order, were interested in obtaining the lowest price for milk used for manufacturing uses. They supported the use of the lower M-W price in nine months of 1973 (R. pp. 447-448) as well as the lower b-p price in the last three months of 1973 (R. p. 466). The proposals to eliminate the b-p price as the effective price in those future months when it might be below the M-W, would conceivably reduce the petitioners' profit margins.

Petitioner, Lehigh, a cooperative association of producers as well as a handler under Order 4 chose to support the continued use of the lower alternative pricing formula to assure a reasonable return on its handler operations (R. pp. 828, 849-850).

Lehigh's position was stated concisely at the rulemaking hearing in February 1974:

"As dairy farmers, the Lehigh Valley Cooperative has over ten and one half million dollars invested in processing reserve supplies for the Mid-Atlantic market.

A substantial amount of this investment has been made in facilities for the manufacture of cheese in expectation of advantages for membership which would not have been anticipated in the absence of such investment and enterprise.

We do not now look with favor, therefore, on proposals which would increase the returns of producers who have not contributed capital and management to the handling of reserve milk supplies by reducing the returns of those who have."
(R. p. 818)

Lehigh's attempt to distinguish between producers who have contributed capital and management to the handling of reserve milk and producers who have not, for pricing purposes, is contrary to the

intent of Section 608c(5)(A), (B)(ii) of the Act. The inclusion in an order of provisions to assure adequate profit margins - whether to proprietary or cooperative association handlers - are not within the exclusive terms and conditions enumerated in Section 608c(5) of the Act.

Finally petitioners failed in their attempt to demonstrate economic hardship at the July 1 hearing, resulting from the order amendments. Testimony was based purely on speculation and assumptions of possible losses. (15-a Tr. pp. 29-49, 69-87)

The petitioners who challenge the Order 2 amendments are under no requirement to purchase Order 2 producer milk, and are permitted under that Order to purchase milk from other sources. They only pay the Order 2 Class II price on such milk as is producer milk under the Order which they utilized for Class II purposes. It is to their economic advantage to purchase producer milk under the Order at those times when the Class II price is lower than prices at which they can obtain milk from other sources. When petitioners do choose to purchase Order 2 milk, they are only held accountable for the Class II price, being reimbursed from the producer settlement fund for any difference between the blend price paid farmers and the Class II price.

Even if petitioners' circumstances are so unique that they find it difficult to meet the price that all of their competitors subject to the Federal Order program must pay, this is not sufficient ground for upsetting the Secretary's decisions. As stated in United States v. Mills, supra. 315 F.2d at page 838: "Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality for the variables are too numerous' he 'fulfills his role when he makes a reasoned' order. Mitchell v. Budd, 350 U.S. 473, 480 (1956)"; See also United Milk Producers of New Jersey v. Benson, 225 F.2d 527, 529 (CA DC, 1955).

III

The 39 Order Decisions

On February 19, 1974, the Assistant Secretary issued four decisions providing for amendment of the classification and pricing provisions of 39 milk orders other than those amended by the decisions herein challenged. The 39 order decisions, whereby reserve milk was priced in each of those orders on the basis of the M-W, was an extremely lengthy document (See Finding of Fact 10) and the Department was not able to provide the public with copies until the decisions were actually published in the Federal

Register in four parts on March 4, 5, 6, and 7, 1974. The Department issued and circulated a press release at the rulemaking hearing on February 20, 1974, announcing the issuance of the 39 order decisions in advance of the Federal Register publication dates. Official notice was taken of these decisions at the rulemaking hearing (R. pp. 138-140).

Petitioner Lehigh asserts that it was denied procedural due process in that it was unable to obtain a copy of the 39 order decisions prior to the publication of the decisions in the Federal Register. Respondent has by affidavit of David Derr explained to the best of its ability the reasons why copies of the lengthy decisions were not available for general circulation until publication in the Federal Register. While there may have been confusion as to the whereabouts of copies in the Department for inspection by interested persons, and perhaps lack of foresight in failing to duplicate extra copies, there appeared to be no conscious effort on the part of any Department employee to deny petitioners access to copies of the decisions.

The major single point determined by the decisions affecting the
of consequence here,
39 milk marketing orders/was that the M-W price would be utilized in
the future as the sole Class II price for all of the 39 orders and

Lehigh was aware of this at the rulemaking hearing. (R. p. 822) Aside from this one point it is doubtful that the remaining contents of the 39 order decisions would have probative value in terms of factual data for presentation in the 8 order rulemaking hearing. Having obtained official notice of the 39 order decisions, the parties to the February hearing were at liberty thereafter to argue, compare, analyze and draw any conclusions they believed meritorious in briefs and exceptions concerning the 39 order decisions and the 8 order hearing in which they participated.

However there was only minor reference to the 39 order decisions following publication in the Federal Register in the briefs and exceptions filed after the February hearing. Passing reference was made in the Lehigh exceptions of July 11, 1974 and brief of May 14, 1974 to the 39 order decisions and how they had been withheld at the February hearing. A dairy cooperative federation in its brief of April 17, 1974 discussed, at pages 9 through 11, how the decisions had not properly evaluated the exceptions filed in that proceeding. The March 29, 1974 brief of the National Farmers' Organization at pages 5 through 11 contained excerpts from the 39 order decisions to show "the gross inconsistencies with such decision that would result if the butter-powder formula is used as a

price determinant in the eight orders."

Except for the NFO brief it is apparent that the participants at the February hearing displayed little interest in the contents of the 39 order decisions aside from the fact that the M-W price would be utilized as the Class II price in those 39 orders.

Accordingly we find no denial of procedural due process in the absence of copies of the 39 order decisions prior to their publication in the Federal Register.

IV

Other Alleged Violations of the Act

Beginning at page 24 of the brief filed on behalf of the nine Order 2 petitioners, the argument is made that, "Even assuming arguendo the existence of a need to align prices among Federal Orders, the standards set forth in the Act were not followed." Petitioners cite Sections 608c(11)(A),(C) and 608c(5)(A) of the Act.

The Assistant Secretary's decisions regarding the alignment of the eight Order Class II prices with such prices in other Federal

Orders is not inconsistent with Section 608c(11)(A) or (C) of the Act. The need to align prices via the M-W price and eliminate the b-p price was based on substantial record evidence reflecting economic and marketing conditions in the eight order marketing areas. In no sense can such action be construed as the issuance of a single order "applicable to all production areas or marketing areas" (608c(11)(A)). In connection with Section 608c(11)(C), that section provides for the issuance of orders prescribing different terms for the same commodity only "so far as practicable" and "as the Secretary finds necessary" to give recognition to differences in production and marketing of milk or its products in different areas. Section 608c(11) has no adverse application to the actions of the Assistant Secretary which are considered here. Further we see no inconsistency in the Assistant Secretary's decisions and orders with 608c(5)(A) of the Act, since the reserve milk price established is "uniform as to all handlers".

Petitioners also cite Section 602(2) of the Act and assert that the decisions and orders complained of fail to conform to the requirements respecting the protection of consumers. However it appears that

the prices referred to by the Act at 7 U.S.C. § 602(2) are parity prices and not retail prices payable by consumers as suggested. Further since the prevailing reserve milk price under the amended orders will be the M-W price, which was also the effective price in eight months of 1971, three months of 1972, and nine months of 1973 (R. Ex. 14, table 1), we see no adverse effects upon consumers.

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ORDER

For the reasons stated herein the relief requested by petitioners is denied and the petitions are dismissed.

Pursuant to the Rules of Practice Governing Procedures under the Act this decision will become final without further procedure 35 days after service thereof, unless appealed to the Secretary by the parties to the proceeding within 30 days after service, as provided in Sections 900.64 and 900.65 of said Rules (7 CFR 900.64 and 900.65).

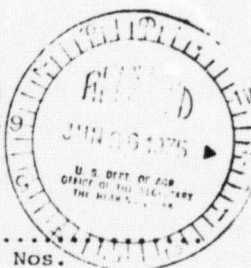
Done at Washington, D.C.

John A. Campbell
Administrative Law Judge

June 2, 1975

1344a

APPEAL PETITION OF CUBA CHEESE COMPANY
(pp. 1344a-1346a)
UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE



.....
IN RE: : AMA Docket Nos.
: :
CUBA CHEESE COMPANY, et al : M2-46 through
: :
Petitioners : M2-54 inclusive
.....

APPEAL PETITION

Petitioners in the above proceedings hereby appeal to the Honorable Earl Butz, Secretary of Agriculture, from the Initial Decision of the Administrative Law Judge, pursuant to Section 8c(15) (A) of the Agricultural Marketing Agreements Act of 1937 as amended (7 U.S.C. §§601 et seq.) and 7 C.F.R. §900.65(a).

Petitioners set forth the following grounds for appeal:

1. The Amendments appealed from (under Docket No. AO-71-A68, hereafter referred to as "the Amendments") were issued as part of a regional milk marketing Order in violation of 7 U.S.C.A. §608c(11) (A);
2. The Amendments were issued as part of a national project to align prices in all milk marketing orders without reference to local conditions in violation of 7 U.S.C.A. §608c(11) (A);
3. The Amendments were issued without prescribing such different terms from other Orders as the record indicates were necessary to give recognition to the differences in production and marketing of milk in the New York-New Jersey areas in violation of 7 U.S.C.A. §608c(11) (C);
4. The Amendments were issued in violation of 7 U.S.C.A. §§602(1) and 602(2) (b) in that there was no evidence to relate the Order to parity prices;

5. The Amendments were issued in violation of 7 U.S.C.A. §602(2) in that the Order did not provide for "gradual correction of the current [price] level" as required by that Statute;

6. Adequate notice of the hearing and adequate opportunity to be heard was not given in violation of 7 U.S.C.A. §608c(3);

7. The Amendments are not adjusted to account for differences between the Minnesota-Wisconsin and Northeast Areas in the grade and quality of milk purchased as required by 7 U.S.C.A. §608c(5)(A)(2);

8. The Amendments are invalid because of the refusal of the Department of Agriculture to produce and make of record its records relating to the validity of the Minnesota-Wisconsin Series (the basic price formula adopted) as required by the Administrative Procedure Act, 5 U.S.C.A. §552(a)(3), and the Orders were therefore not based upon evidence in the record;

9. The Department of Agriculture failed to give the advance notice of the "Emergency Amendments" thirty days before their effective date, as provided in 5 U.S.C.A. §553(d), giving handlers only four days to accommodate to fundamental and radical changes in milk prices and marketing patterns;

10. The Proponents failed to sustain their burden of proof imposed upon them by 5 U.S.C.A. §556(d), and the Amendments issued on the basis of the hearing record were therefore illegal;

11. The Emergency Amendment was issued in violation of 5 U.S.C.A. §557 in that no tentative or recommended decision was issued and no reasonable opportunity was given for the parties to submit proposed findings and conclusions, and exceptions to any recommended decision: 5 U.S.C.A. §557(d);

12. The Amendments are arbitrary, capricious, an abuse of discretion, and not in accordance with law;

13. The Amendments are contrary to the constitutional rights of the Petitioners;

1346a

14. The Amendments exceed the Secretary's statutory jurisdiction and authority;

15. The Amendments did not observe the procedures required by law;

16. The Amendments were unsupported by substantial evidence.

WHEREFORE, Petitioners respectfully pray that the Secretary rescind the Orders promulgated at Docket AO-71-A68 on March 27, 1974 and July 25, 1974, and grant such other relief as he may deem just and equitable under the circumstances.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

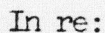
By: David C. Toomey

Attorneys for Petitioners

JUDICIAL OFFICER'S DECISION AND ORDER

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE



Cuba Cheese Company, et al.,

Petitioners

AMA Docket No. M 2-46,
et seq.

Decision and Order

This is a proceeding under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.).

An Initial Decision was filed on June 2, 1975, by Administrative Law Judge John A. Campbell. The petitioners in AMA Docket Nos. M 2-46 through M 2-54, which include all of the petitioners in the proceeding except Lehigh Valley Cooperative Farmers, filed an appeal to the Secretary on June 26, 1975. Final administrative authority to decide cases subject to the Administrative Procedure Act has been delegated to the Judicial Officer (37 F.R. 28475; 38 F.R. 10795).*/

Upon a careful consideration of the entire record, which is described on page 5 of the Initial Decision, the Initial Decision and Order is adopted as the final Decision and Order herein, except

*/ The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550). The Department's first Judicial Officer held the office from 1942 to 1972. The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

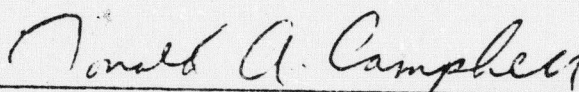
1348a

2

that on page 2, line 16, the words "at an" are deleted and are replaced by "below the Minnesota-Wisconsin price by the"; on page 6, three lines from the bottom, the comma is deleted after "Lehigh"; on page 9, line three, "Difference" is changed to "Differences"; on page 45, line five, "the" is inserted after "by"; and on page 58, the second paragraph of the order is deleted. Copies of those pages, as changed, are attached hereto.

Done at Washington, D.C.

August 26, 1975



Donald A. Campbell
Judicial Officer
Office of the Secretary

producer milk at prices based on the Minnesota-Wisconsin price series rather than at prices based on the lower of the Minnesota-Wisconsin price series or the butter powder formula.

The rulemaking hearing which gave rise to the challenged decisions and orders was conducted during the period February 20, 1974 through February 28, 1974. The subject matter at that hearing was both the need to amend 8 federal milk marketing orders regarding the pricing provisions for reserve milk and whether an emergency existed requiring immediate action. A partial decision was issued on March 27, 1974 (39 FR 11567) in which an emergency was found to exist. Thereafter an order amending the eight milk orders was issued on March 29, 1974 (39 FR 11980) to provide, for the period April 3, 1974 through July 31, 1974: that the price for reserve milk utilized in manufacturing uses (except butter and nonfat dry milk) in the 8 markets would be based upon the Minnesota-Wisconsin series price, and that milk utilized in butter and nonfat dry milk production would be priced below the Minnesota-Wisconsin price by the amount, not to exceed 50 cents, that the butter powder formula price was less than the Minnesota-Wisconsin series price.

Findings of Fact

1. The petitioners, Cuba Cheese Company, Deltown Foods Inc., Saratoga Dairy, Inc., Queensboro Farm Products, Inc., Queens Farms Inc., Crowley's Foods Inc., Pollio Dairy Products Corp., Friendship Dairies, Inc., and Elmhurst Milk & Cream Co., Inc., handlers under Order No. 2, each operate plants that manufacture milk into various Class II dairy products. With the exception of Cuba Cheese Company and Pollio Dairy Products Corp., the plants of said petitioners are "pool plants" subject to the pricing provisions of Order No. 2, which are not required to ship a prescribed percentage of milk receipts to remain qualified under the order. The plants of Cuba Cheese Company and Pollio Dairy Products Corp., are not "pool plants" and are not subject to the pooling provisions of Order No. 2, but purchase their milk from pool plants or cooperative associations. (Pleadings; 15-a Tr. pp. 77-80, 86-87; R.pp. 431-432)

2. Petitioner, Lehigh Valley Cooperative Farmers, is a handler and a cooperative association of nearly 1,000 dairy farmers, 675 of whom are producers as defined by the provision of Order No. 4. In addition to acting as a bargaining agent for its member producers, Lehigh operates milk processing plants, including a newly-constructed cheddar cheese manufacturing plant. In this latter capacity it is obligated to account

blend price is announced by the market administrator and each handler is required to pay each of his producers this price for the milk delivered by the producer. Differences between the handler's Class or use value of milk and the uniform price paid to producers, are paid to or withdrawn from a clearing house fund called a producer settlement fund. (7 CFR Parts 1000 through 1139)

6. Different price indices have been used to determine prices for the classes of milk utilization (Classes I and II/III) established by federal milk orders. One of which is the Minnesota-Wisconsin Series Price (hereafter called "M-W price") which was first adopted as the lowest use class price in the Chicago Order beginning September, 1961. This price series represents the average of prices reported as paid to dairy farmers for manufacturing grade milk by a representative group of plants located in Minnesota and Wisconsin. All of the 61 Federal Milk Orders that regulate milk handling in various marketing areas throughout the nation utilize the M-W price in providing a method for fixing monthly Class I prices. The Class I price typically consists of the Minnesota-Wisconsin price plus the sum that has been determined to reflect the difference between manufacturing grade milk prices and the price that is the minimum handlers requiring locally approved milk for fluid milk utili-

1352a

nor is it obligated to introduce evidence to explain the make up of the M-W series. Rights petitioners may have to demand information as to the confidential details of the M-W price under statutes such as the Freedom of Information Act, do not include the right to delay an emergency hearing. The rulings by the Administrative Law Judge (R. pp. 191-192) were sound and fully supported by controlling law. Further we believe the Secretary has undertaken to fully answer all of the questions posed by Lehigh's requests of February 22 and March 11, 1974 (15-a, Lehigh Exhibits 1, 2, 3, 3a; R. Ex. 33, 34).

During the course of the July 15-a hearing, counsel for the nine Order No. 2 petitioners sought to introduce into evidence at that hearing the deposition of one Dwight Morris dated May 31, 1974. The gist of the deposition was that the M-W series price was "rigged" or manipulated to yield a higher price through payments by certain plants in excess of normal producer pay prices in Minnesota and Wisconsin. The deposition, since it was dated May 31 and was subsequent to the rulemaking hearing of February, was ruled inadmissible by me

1353a

ORDER

For the reasons stated herein the relief requested by petitioners is denied and the petitions are dismissed.

Done at Washington, D.C.

/s/ John A. Campbell
John A. Campbell
Administrative Law Judge

June 2, 1975

DOCUMENTS FROM THE DISTRICT COURT RECORD

1354a

COMPLAINT

(pp. 1354a-1359a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

.....
FRIENDSHIP DAIRIES, INC.
Maspeth, New York

POLLIO DAIRY PRODUCTS CORP.
Brooklyn, New York

CROWLEY FOODS, INC.
Binghamton, New York

QUEENSBORO FARM PRODUCTS, INC.
Long Island City, New York

SARATOGA DAIRY, INC.
Saratoga Springs, New York

DELTOWN FOODS, INC.
Deltown, New York

ELMHURST MILK AND CREAM CO., INC.
Jamaica, New York

QUEENS FARMS, INC.
Ozone Park, New York

CUBA CHEESE AND TRADING CO., INC.
Cuba, New York
Plaintiffs

vs.

EARL BUTZ, UNITED STATES
SECRETARY OF AGRICULTURE
Defendant
.....

CIVIL ACTION NO.

COMPLAINT IN EQUITY

Jurisdiction.

1. This action is brought pursuant to jurisdiction conferred by the Agricultural Marketing Agreements Act, Act of May 12, 1933, C.25, Title 1, Section 8c(15)(B), 7 U.S.C.A. Section 608c(15)(B) (hereafter referred to as "the Act").

Parties.

2. Plaintiffs are "handlers" as defined in the Act (7 U.S.C.A. §608c(1)), who have their principal places of business at the locations set forth in the caption. Plaintiffs handle milk and milk products subject to the Act and to lawful regulations issued from time to time by the United States Secretary of Agriculture pursuant to authority conferred by the Act. In particular, Plaintiffs are subject to the provisions of Federal Milk Marketing Order No. 2 (hereafter referred to as "Order No. 2"), 7 C.F.R. Part 1002.

3. Defendant is the Secretary of Agriculture of the United States.

Nature of the Action.

4. At Docket No. AO-71-A68, the Defendant issued certain Orders amending Order No. 2 which changed the method of calculating the prices which handlers subject to the Order must pay dairy farmers for milk used in manufactured milk products, such as cheese, ice cream, cottage cheese, etc. Plaintiffs appealed

from these Orders through the administrative appeal procedures provided by 7 U.S.C.A. Section 608c(15)(A) on the ground that the Orders were not in accordance with law. Plaintiffs have exhausted their administrative remedies, and bring this action to review the final administrative ruling affirming Defendant's Orders, on the ground that they are not in accordance with law.

Factual Context.

5. Plaintiffs are "handlers" engaged in the manufacture of milk products.

6. In general, the Milk Marketing Orders issued pursuant to the Act established the prices which "handlers" must pay to "producers", i.e., farmers for "raw milk"; and establish different pay prices depending upon the use to which the raw milk is put. Under Federal Order No. 2, and other Orders, prior to the Amendments which are the subject of this case, the price of milk which manufacturers of milk products were required to pay to farmers was the lower of two formula prices announced by the Department of Agriculture, i.e., the price based upon the "Minnesota-Wisconsin formula", or the price based upon the "butter-powder formula".

7. On February 12, 1974, the Department of Agriculture issued a Notice of Hearing respecting amendments to eight Federal Orders, including Federal Order No. 2, all affecting Plaintiffs. The hearing commenced only eight days later--on February 20, 1974--and concluded on February 28. The majority of parties present--including most farmer groups, protested the short notice and denied the existence of any emergency which would justify avoidance of the usual administrative procedures.

8. On March 27, 1974, Defendant issued an Order effective April 1, 1974, eliminating the butter-powder formula as a basis for

pricing milk to be used in manufacturing milk products (except partially for butter and milk powder) for the period April 1, 1974 through July 31, 1974.

9. On July 25, 1974, Defendant, without a further hearing, issued a further Order which became effective August 1, 1974, eliminating the butter-powder formula completely as an alternate method of pricing milk used in manufactured milk products.

10. The ruling of the Defendant affirming his Orders first suspending and then eliminating the butter-powder formula as an alternate method of pricing milk used for manufacturing purposes are not in accordance with law because:

(a) The Amendments appealed from (under Docket No. AO-71-A68, hereafter referred to as "the Amendments") were issued as part of a regional milk marketing Order in violation of 7 U.S.C.A. §608c(11)(A);

(b) The Amendments were issued as part of a national project to align prices in all milk marketing orders without reference to local conditions in violation of 7 U.S.C.A. §608c(11)(A);

(c) The Amendments were issued without prescribing such different terms from other Orders as the record indicates were necessary to give recognition to the differences in production and marketing of milk in the New York-New Jersey areas in violation of 7 U.S.C.A. §608c(11)(C);

(d) The Amendments were issued in violation of 7 U.S.C.A. §§602(1) and 602(2)(b) in that there was no evidence to relate the Order to parity prices;

(e) The Amendments were issued in violation of 7 U.S.C.A. §602(2) in that the Order did not provide for "gradual

correction of the current [price] level" as required by that Statute;

(f) Adequate notice of the hearing and adequate opportunity to be heard was not given in violation of 7 U.S.C.A. §608c(3);

(g) The Amendments are not adjusted to account for differences between the Minnesota-Wisconsin and Northeast Areas in the grade and quality of milk purchased as required by 7 U.S.C.A. §608c(5)(A)(2);

(h) The Amendments are invalid because of the refusal of the Department of Agriculture to produce and make of record its records relating to the validity of the Minnesota-Wisconsin Series (the basic price formula adopted) as required by the Administrative Procedure Act, 5 U.S.C.A. §552(a)(3), and the Orders were therefore not based upon evidence in the record;

(i) The Department of Agriculture failed to give the advance notice of the "Emergency Amendments" thirty days before their effective date, as provided in 5 U.S.C.A. §553(d), giving handlers only four days to accommodate to fundamental and radical changes in milk prices and marketing patterns;

(j) The Proponents failed to sustain their burden of proof imposed upon them by 5 U.S.C.A. §556(d), and the Amendments issued on the basis of the hearing record were therefore illegal;

(k) The Emergency Amendment was issued in violation of 5 U.S.C.A. §557 in that no tentative or recommended decision was issued and no reasonable opportunity was given for the parties to submit proposed findings and conclusions, and exceptions to any recommended decision: 5 U.S.C.A. §557(d);

(l) The Amendments are arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(m) The Amendments are contrary to the constitutional rights of the Petitioners;

(n) The Amendments exceed the Secretary's statutory jurisdiction and authority;

(o) The Amendments did not observe the procedures required by law;

(p) The Amendments were unsupported by substantial evidence.

WHEREFORE, the Court is requested to remand these proceedings to the Secretary with directions to vacate his Orders of March 27, 1974 and July 25, 1974, and to reinstate the butter-powder formula as an alternate method for pricing manufacturing milk; or,

In the alternative, to remand these proceedings to the Secretary with directions to reconsider the Hearing record in this case and to such further proceedings as the law requires; and

To grant such other relief as may be appropriate under the circumstances.

BOOTH, LIPTON AND LIPTON

By _____

292 Madison Avenue
New York, New York 10013

Attorneys for Plaintiffs

OF COUNSEL:

David C. Toomey, Esquire
DUANE, MORRIS & HECKSCHER
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Philadelphia, PA 19110

ANSWER

(pp. 1360a-1364a)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

.....
 FRIENDSHIP DAIRIES, INC.
 Maspeth, New York

.....
 CIVIL ACTION NO. 75 C 1517

.....
 POLLIO DAIRY PRODUCTS CORP.
 Brooklyn, New York

.....
 CROWLEY FOODS, INC.
 Binghamton, New York

.....
 QUEENSBORO FARM PRODUCTS, INC.
 Long Island City, New York

.....
 SARATOGA DAIRY, INC.
 Saratoga Springs, New York

.....
 DELTOWN FOODS, INC.
 Deltown, New York

.....
 ELMHURST MILK AND CREAM CO., INC.
 Jamaica, New York

.....
 QUEENS FARMS, INC.
 Ozone Park, New York

.....
 CUBA CHEESE AND TRADING CO., INC.
 Cuba, New York

Plaintiffs

vs.

EARL BUTZ, UNITED STATES
 SECRETARY OF AGRICULTURE

Defendant

ANSWER

The defendant, Earl L. Butz, by his attorney David G. Trager, United States Attorney for the Eastern District of New York, answers the allegations of the plaintiff's complaint as follows:

1. Paragraph 1 of the complaint setting forth the jurisdiction of this Court is admitted as to the following plaintiffs: Queensboro Farm Products, Inc.; Elmhurst Milk & Cream Company, Inc.; and Queens Farms,

Inc. As to Friendship Dairies, Incorporated; Crowley Food, Incorporated; 1361a
Saratoga Dairy, Incorporated; and Deltown Foods, Incorporated, these
plaintiffs neither have their residence nor principal place of business
within the jurisdiction of this Court, and therefore paragraph 1 is
denied as to them. Furthermore, Pollio Dairy Products Corporation and
Cuba Cheese and Trading Company are not "handlers" subject to the Order,
and therefore paragraph 1 is denied as to them.

2. Paragraph 2 of the complaint is admitted, except that plain-
tiffs Pollio Dairy Products Corporation and Cuba Cheese and Trading
Company are not handlers subject to the provisions of Federal Milk
Marketing Order No. 2 (7 CFR Part 1002), and therefore paragraph 2 is
denied as to them.

3. Paragraph 3 of the complaint is admitted.

4. Paragraph 4 of the complaint is admitted except that the amend-
ment of Order No. 2, of which plaintiffs complain, did not result in a
change in the method of calculating prices which handlers subject to the
Order must pay producers in the sense that the existing price determinant
was replaced by a new price determinant. Prior to the amendment, the
price determinant was the lower of either the Minnesota-Wisconsin series
price^{1/} or the butter powder snubber.^{2/} The Secretary's decision to
amend Order No. 2 only eliminated the provision for the alternate use of
the butter-powder snubber during those months in which it was lower than
the Minnesota-Wisconsin pricing series.

^{1/} A price derived from the estimated average price for milk received
at manufacturing plants for the proceeding or base month and an
estimated change from the base month. The level for the base
month, which is used as a benchmark, is based on reports of pay
prices from a survey of approximately 340 manufacturing plants
in Minnesota and Wisconsin. These plants are not subject to
federal price regulations and their reports are furnished
voluntarily and conditioned upon being held confidential.

^{2/} A price computed by considering the market quotations for butter
and nonfat dry milk powder on the Chicago market. On the basis
of the amount of butter and powder that a hundred pounds of milk
will normally yield, a price is derived for a hundred pounds of
milk so utilized less a sum considered to be the cost of
converting the milk into butter and powder.

5. Paragraph 5 of the complaint is admitted with the qualification as to plaintiffs Pollio Dairy Products Corporation and Cuba Cheese Trading Company set forth in paragraphs 1 and 2 above.

6. Paragraph 6 of the complaint is denied; the language of the Act and Order 2 speak more fully for themselves than as stated by the plaintiff.

7. Paragraph 7 of the complaint is admitted except that defendant is without sufficient knowledge or information as to the affect on plaintiffs Pollio Dairy Products Corporation and Cuba Cheese and Trading Company and therefore denies the allegations as to them. It is further denied that the "majority of parties present--including most farmer groups, protested the short notice and denied the existence of any emergency which would justify avoidance of the usual administrative procedures."

8. Paragraph 8 is admitted, except to state the Order issued by the Secretary on March 27, 1974, became effective April 3, 1974.

9. Paragraph 9 is admitted, with the clarification that the final Order issued on July 25, 1975, was based upon the full record developed during the February 20 through 28, 1974 hearing, and took into consideration the record thus made and all briefs and exceptions filed in that proceeding.

10. Paragraph 10 of the complaint is denied.

The remainder of plaintiffs' complaint is the prayer for relief and requires no response.

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Plaintiffs Friendship Dairies, Incorporated, Crowley Food Incorporated, Saratoga Dairy Incorporated, and Deltown Food, Incorporated, are not

properly before this Court under the terms of 7 U.S.C. 608c(15)(B) in that they are neither an inhabitant nor do they maintain their principal place of business within the Eastern District of New York. Therefore, this Court is without jurisdiction over any claims such plaintiffs may have under the Agricultural Marketing Agreement Act of 1937.

Answering further, plaintiffs Pollio Dairy Products Corporation and Cuba Cheese and Trading Company are not "handlers" subject to Order No. 2 (7 CFR 1002) and therefore they have no standing before this Court under the terms of 7 U.S.C. 608c(15)(B).

THIRD DEFENSE

Answering further, the defendant alleges that the findings, conclusions, ruling and order of the Judicial Officer of the United States Department of Agriculture, acting as and for the Secretary of Agriculture, which ruling and order adopted the recommended decision of the Administrative Law Judge, are supported by substantial evidence in the record before him and are in accordance with law.

Answering further, the defendant alleges that only those matters before the Administrative Law Judge and the Judicial Officer in the forum below are reviewable in this action and that no new matter can be considered herein, and that a certified copy of all proceedings below will be filed with the Court.

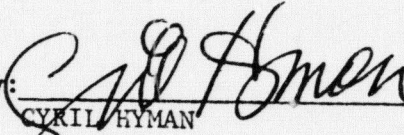
WHEREFORE, all premises considered, the defendant, the Secretary of Agriculture, respectfully prays that judgment be entered in this civil action in his favor and that the plaintiff take nothing by this suit and that the same be dismissed with prejudice and that the defendant recover

1364a

his court costs and have such other and further relief to which he may be entitled.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney

By: 
CYRIL HYMAN
Assistant United States Attorney

OF COUNSEL:

Daniel W. Wentzell
Attorney
Department of Agriculture

NOTICE OF MOTION TO INTERVENE

(pp. 1365a-1366a)

1365a

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----x

FRIENDSHIP DAIRIES, INC., et al., :

Plaintiffs, :

-against- :

NOTICE OF MOTION

EARL BUTZ, SECRETARY OF THE :

75 Civ. 1517

DEPARTMENT OF AGRICULTURE :

OF THE UNITED STATES, :

Defendant. :

-----x

S I R S :

MOTION TO INTERVENE AS A DEFENDANT

PLEASE TAKE NOTICE that Pennmarva Dairymen's Cooperative Federation, Inc., individually and on behalf of the following individual members, Inter-State Milk Producers' Cooperative, Maryland Cooperative Milk Producers Incorporated, Maryland and Virginia Milk Producers Association, Inc., and Capitol Milk Producers Cooperative, Inc., moves for leave to intervene as a defendant in this action, pursuant to Rule 24(a) and (b) in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that it has a substantial economic interest relating to the property and transaction which are the subject of this action and the disposition of the action may as a practical matter impair or impede its ability to protect its interests and the interests of its farmer members, which legal interests are not now adequately represented in the action, and as such has a defense to plaintiffs claims presenting both questions of law and of

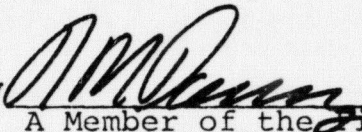
1366a

fact which are common to the main action.

Dated: New York, New York
November 18, 1975

Yours, etc.,

SIMPSON THACHER & BARTLETT

By 
A Member of the firm
Attorneys for Pennmarva
Dairymen's Cooperative
Federation, Inc., Applicant
for Intervention
Office and P.O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:

DONALD F. COPELAND
SPEESE, BONGIOVANNI & COPELAND
617 Four Penn Center
Philadelphia, Pa. 19103

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FRIENDSHIP DAIRIES, INC., et al, :

Plaintiffs :

v. :

Civil Action No. 75C-1517

EARL BUTZ, SECRETARY OF THE
DEPARTMENT OF AGRICULTURE
OF THE UNITED STATES,

Defendant :

AFFIDAVIT IN SUPPORT OF MOTION TO INTERVENE

COMMONWEALTH OF PENNSYLVANIA:

SS.

COUNTY OF PHILADELPHIA :

PAUL E. HAND, being duly sworn according to law, deposes
and says:

1. He is the Secretary of Pennmarva Dairymen's Cooperative Federation, Inc., (hereinafter "Pennmarva") and as such, is duly authorized to make this affidavit on its behalf.
2. He is an economist holding a PH.D. degree in agricultural economics, is employed by Inter-State Milk Producers Cooperative, a member of Pennmarva, as economist and Assistant General Manager and that he is familiar with milk marketing conditions in Federal Milk Marketing Order Areas 2 and 4 and generally familiar with conditions in other Milk Marketing Order areas which could be effected by the outcome of this action.
3. Pennmarva is an agricultural cooperative organized under the laws of the State of Maryland with its principal office at 1717 Gwynn Oak Avenue, Baltimore, Maryland.

4. The individual members of Pennmarva are Inter-State Milk Producers' Cooperative, Maryland Cooperative Milk Producers Incorporated, Maryland and Virginia Milk Producers Association, Inc., Capitol Milk Producers Cooperative, Inc., and Lehigh Valley Cooperative Farmers. Lehigh Valley Cooperative Farmers is not participating with Pennmarva in this action.

5. The Cooperative members of Pennmarva, and their approximately 6000 dairy farmer members, market milk principally in an area regulated by Federal Milk Marketing Order No. 4 (7 C.F.R. 1004). While the Complaint contains allegations with respect to Order 2, nevertheless the Plaintiffs' prayer for relief, if granted by the Court, would also have a substantial effect upon the pricing provisions of Order 4 and other milk marketing areas. Pennmarva and its farmer members could suffer irreparable injury, financial and otherwise, if the present pricing provisions of Order 4 were made ineffective. A modification of the present pricing provision of Order 4 could also have a substantial, adverse effect on Pennmarva and its members.

6. Plaintiffs' attack upon the Orders of the Secretary of Agriculture dated March 27, 1974 and July 25, 1974 constitute a direct attack upon the pricing provisions of Federal Milk Marketing Order Numbers 1, 2, 4, 15, 33, 36, 40 and 49, all of which could be effected by a judgment of this Court. The consequence of the Court granting the relief prayed for could result in disorderly marketing conditions in each of the eight milk marketing areas which could have a further adverse effect

upon farmers and consumers.

7. Plaintiffs recognize in paragraphs 6 and 7 of their Complaint that the action of the Secretary of which they complain effects all eight milk marketing Order areas recited in paragraph 6, above. Any action by the Court effecting that action of the Secretary will have an effect upon Pennmarva.

8. In a similar action instituted by Plaintiffs in the United States District Court for the District of Columbia in which Plaintiffs made substantially the same allegations and sought injunctive relief Pennmarva was granted leave to intervene and did in fact intervene and became a party in that action. (That action was dismissed because Plaintiffs had failed to exhaust their administrative remedy.)

9. Thereafter, Pennmarva intervened in the action instituted by Plaintiffs pursuant to Section 8c(15)(A) of the Agricultural Marketing Agreement Act. It is the administrative decision regarding that action which Plaintiffs are appealing to this Court.

10. Prior to the Order of the Secretary dated March 27, 1974 (Paragraph 8 of Complaint) plaintiffs had a substantial price benefit at the expense of local dairy farmers. The difference in price between the Minnesota-Wisconsin price and the butter-powder formula was causing dairy farmers to receive less than the full use value for reserve milk and was disrupting production and marketing conditions in the eight markets referred to in paragraph 5. The Decision and Order of the Secretary here under attack tended to correct this disparity and to restore orderly

marketing conditions.

1370a

11. On the face of Plaintiffs' Complaint, Plaintiffs seek relief only with respect to Order 2. However, such relief granted only to Order 2 could leave Orders 1, 4, 15, 33, 36, 40 and 49 with a higher price under some circumstances, thus creating a competitive advantage for Plaintiffs and disorderly marketing conditions through misalignment of prices.

12. Use of the pricing structure under the Secretary's Order of March 27, 1974, effective April 1, 1974, over the long run will more nearly return to farmers the full use value of milk than the pricing structure in effect prior to April 1, 1974.

13. Pennmarva participated in the emergency hearing held February 20-28, 1974 in Washington, D.C. and presented evidence in favor of the pricing provisions which are now under attack by Plaintiffs. Pennmarva also voted in favor of the pricing provisions in the producer referendum.

14. Pennmarva and its individual cooperative members seek to intervene in the subject action in order to be afforded an opportunity to place before the Court its position and the position of its approximately 6000 members in the light of the fact that they will be directly affected by the judgment of the Court.

15. Pennmarva expects to present a defense to plaintiffs' claims presenting both questions of law and of fact which are common to the main action.



PAUL E. HAND

Sworn to and subscribed

before me this 10th day
November
of 1975.

MARY E. QUINN, Notary Public
LOWER MICHIGAN
-4- LANSING COUNTY

1371a

OPINION AND ORDER GRANTING INTERVENTION

(pp. 1371a-1376a)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -x
FRIENDSHIP DAIRIES, INC., et al.,

Plaintiffs,

75 C 1517

-against-

EARL BUTZ, SECRETARY OF THE
DEPARTMENT OF AGRICULTURE OF THE
UNITED STATES,

Defendant.

MEMORANDUM
AND
ORDER

- - - - -x

APPEARANCES:

SIMPSON THACHER & BARTLETT, ESQS.
Attorneys for Penamarva Dairymen's
Cooperative Federation, Inc.,
Applicant for Intervention
By DONALD F. COPELAND, ESQ.,
SPEESE, BONGIOVANNI & COPELAND
(Philadelphia, Pa.), of Counsel

BOOTH, LIPTON & LIPTON, ESQS.
Attorneys for Plaintiffs
By DAVID C. TOOMEY, ESQ.,
DUANE, MORRIS & HECKSCHER
(Philadelphia, Pa.), of Counsel

DAVID G. TRAGER, ESQ.
United States Attorney,
Eastern District of New York
Attorney for Defendant
By CYRIL HYMAN, ESQ.
Assistant U.S. Attorney

NEAHER, District Judge.

Milk Marketing Orders of the United States Secretary of Agriculture provide formulae for calculating milk prices to be paid by handlers¹ for purchases of milk from producers.² Different orders apply for various areas of the country. Order No. 2, with which this action is concerned, sets prices for milk delivered to handlers in eastern New York and northern New Jersey.³ The present action was brought by Friendship Dairies, Inc. and a number of other companies, handlers governed by Order No. 2, to review the legality of the Secretary's amendment of the Order in March 1974, which changed the formula to be used in calculating the price handlers must pay producers.

The matter now under consideration does not involve the merits of the action but is a motion to intervene as a defendant by Pennmarva Dairymen's Cooperative Federation, Inc., a milk producer which is a cooperative of 6000 farmers in the region covered by Order No. 4. Order No. 4 is "the Middle Atlantic marketing area," including the District of Columbia, Delaware, parts of Maryland, New Jersey, Pennsylvania and Virginia.⁴ The court has concluded that the motion to intervene should be granted as of right, F.R.Civ.P. 24(a)(2).

Pennmarva may intervene as of right if it

"claims an interest relating to the property or transaction which is the subject of the action and [it] is so situated that the disposition of the action may as a practical

matter impair or impeded [its] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." F.R.Civ.P. 24(a)(2).

Thus Pennmarva must make a sufficient showing of each of three requirements, (i) an interest in the transaction, (ii) an impediment in protecting its interest because of the action, and (iii) inadequate representation of its interest by the Secretary. See Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967). See generally New York Public Interest Research Group, Inc. v. Regents of University of State of New York, 516 F.2d 350 (2 Cir. 1975).

Pennmarva maintains, first, that it and its farmer members stand to be directly affected by the Order under attack and have a substantial interest in seeing that its legality is upheld. Plaintiff Friendship Dairies, in opposition to the motion, has contended that Pennmarva lacks a substantial interest in that its action is concerned solely with Order No. 2, whereas Pennmarva is governed by Order No. 4, a completely separate order.

In response Pennmarva claims that Orders Nos. 2 and 4 have overlapping milk sheds and, given competition among handlers, voiding the amendment to Order No. 2 would create a misalignment of markets and affect the blend prices of milk in Marketing Areas 2 and 4. The court notes the geographical proximity of Marketing Areas 2 and 4, and especially the fact that northern New Jersey is within Area 2 while the rest of the State is in

Area 4.

In addition, Pennmarva claims that Order No. 2, as amended, is not an isolated order because the amendment procedure under attack involved several Orders, including Order No. 4, and only one amendment for all Orders was issued. Under dispute by plaintiffs and Pennmarva is whether any action by the court would affect all marketing areas as Pennmarva claims, or only Order No. 2, the position of plaintiffs.

Pennmarva also has asserted, as indicative of its interest, that the present action is the third filed by plaintiffs to invalidate the amendment and that it has been permitted to intervene in each of the prior actions.⁵ Pennmarva also participated on behalf of procedures in the hearing of February 1974 which resulted in the amendment. It is the court's view that Pennmarva has made a sufficient showing of its interest in the matter which is the subject of the action.

Moreover, Pennmarva is so situated that disposition of the action may, practically speaking, impair its ability to protect its interest. Pennmarva has enjoyed the benefit of the amended Order, and an adverse decision by this court could have a substantial economic impact on marketing conditions affecting it. It is also clear that, as a producer, Pennmarva would have had standing to contest the validity of an Order affecting it were

it aggrieved by the decision of the Secretary, Stark v. Wickard, 321 U.S. 288 (1944); United States v. Lehigh Valley Cooperative Farmers, Inc., 294 F. Supp. 140, 143 (E.D. Pa. 1968). Where, as here, the other side of the coin appears, its ability to protect its interest in the validity of the amended Order is, as a practical matter, impaired merely by not having been named a party.

Finally, Pennmarva has sufficiently shown an interest that appears not to be adequately represented by the named defendant, the Secretary of Agriculture. Pennmarva has a real economic interest not shared by the government, namely, the interest of the milk producers in upholding validity of the amended Order. Although the mere statement of an economic interest does not invariably mean inadequate representation by the government, here the court believes "there is a likelihood that the [producer] will make more vigorous presentation of the economic side of the argument." New York Public Interest Research Group, Inc. v. Regents of Univ. of St. of N.Y., supra, at 352.

The court having concluded that Pennmarva has satisfied each of the requirements of rule 24(a)(2), F.R.Civ.P., the motion to intervene as a defendant is granted.

SO ORDERED.

s/ EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, New York
December 24, 1975

F O O T N O T E S

- 1 Generally, manufacturers of milk products. See 7 U.S.C. §608(c)(1); 7 C.F.R. §1002.7.
- 2 Generally, dairy farmers. See 7 C.F.R. §1002.6.
- 3 7 C.F.R. §1002.3.
- 4 7 C.F.R. §1004.2.
- 5 The first action, Crowley Foods, Inc. v. Butz (D.D.C. 1974) (Civ. No. 74-516), was dismissed for failure to exhaust administrative remedies. The second, the administrative appeal to the Secretary of Agriculture, 7 U.S.C. §608(c)(15) (A), resulted in the amendment being affirmed. The third and instant action is to review the action of the Secretary, 7 U.S.C. §608c(15)(B).

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT *Neale*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

.....
FRIENDSHIP DAIRIES, INC., et al :
 :
Plaintiffs :
 :
vs. :
 :
EARL BUTZ, et al :
 :
Defendants :
.....

No. 75 Civ. 1517

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The Plaintiffs in the above matter, by their attorneys, Booth, Lipton & Lipton, Esquires, respectfully move Your Honorable Court pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the entry of Summary Judgment in their favor, on the ground that there is no issue as to any material fact, and that Plaintiffs are entitled to a judgment as a matter of law.

BOOTH, LIPTON & LIPTON

By _____

405 Park Avenue
New York, NY 10022

OF COUNSEL:

David C. Toomey, Esquire
DUANE, MORRIS & HECKSCHER
1600 Land Title Building
Philadelphia, PA 19110

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
(pp. 1378a-1412a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

.....	:	
FRIENDSHIP DAIRIES, INC., et al	:	
	:	
Plaintiffs	:	
	:	
vs.	:	No. 75 Civ. 1517
	:	
EARL BUTZ, et al	:	
	:	
Defendants	:	
.....	:	

MEMORANDUM OF LAW SUBMITTED BY PLAINTIFFS
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is an appellate proceeding under Section 15(B) of the Agricultural Marketing Agreements Act, 7 U.S.C.A. §608c(15)(B). In this action, the Plaintiffs ask the Court to review an Order of the United States Secretary of Agriculture to determine whether or not that Order, and the procedure by which it was issued, are "in accordance with law": United States v. Mills, 315 F.2d 828 (4th Cir.), cert. den'd 375 U.S. 819 (1963).

The case comes before the Court at this time upon the Plaintiffs' Motion for Summary Judgment under F.R.C.P. 56, pursuant to the procedure previously agreed to among counsel and approved by the Court. The entire administrative record

has been filed with the Court, and no further evidence will be submitted. The case at this stage is in essence a "case stated", involving solely the application of the law to the administrative record previously developed, and to the resulting Order by the Secretary.

The Plaintiffs contend that the Order violated the substantive and procedural provisions of the Agricultural Marketing Agreements Act, supra, as well as the requirements of the Administrative Procedure Act, 5 U.S.C.A. §551 et seq.; and Plaintiffs contend further that the Order was not based upon record evidence as required by both of those Acts, and the Due Process Clause in the 5th Amendment to the United States Constitution. The Plaintiffs ask that the Order be vacated, and matter remanded to the Secretary for further proceedings, as the Agricultural Marketing Agreements Act provides: 7 U.S.C.A. §608c(15)(B).

STATEMENT OF THE CASEA. Summary.

The Plaintiffs are "handlers" of milk as defined in the Agricultural Marketing Agreements Act, supra (hereafter "the Act"). In essence, a "handler" is a person who purchases raw, unprocessed milk from dairy farmers, whom the Act calls "producers". As "handlers", Plaintiffs are subject to the lawful Marketing Orders issued by the Secretary under the Act. The purchase of raw milk by these Plaintiffs is directly or indirectly governed by "Federal Order No. 2" (7 C.F.R. Part 1002), which is the Order covering the "New York/New Jersey Marketing Area".

During the year 1974, the Secretary issued certain Amendments to Federal Order No. 2 which directly affected these Plaintiffs. Plaintiffs appealed those Amendments through the administrative appeal channels, without success. Having exhausted their administrative remedies, they have now come to Court seeking relief. The relief which Plaintiffs seek is a Judgment invalidating the 1974 Amendments to Federal Order No. 2.

B. Description of the Federal Order System and Material Provisions in the Federal Order.

The Agricultural Marketing Agreements Act of 1937 empowers the Secretary of Agriculture, inter alia, to establish

the minimum prices which "handlers" must pay to farmers for their milk. The Act provides that the prices established by the Secretary shall be uniform, subject to variations for regional differences in local marketing conditions: 7 U.S.C.A. §§608c(11)(A) and (C).

The device used by the Secretary to carry out this duty has been the issuance of regional Marketing Orders. Order No. 2, which is the Order involved in this case, covers roughly the Eastern half of New York State (including New York City and Long Island) and Northern New Jersey.

Under the Orders, the Secretary has established different minimum prices which handlers must pay for raw milk, depending upon the end-use to which the milk is put. Generally speaking, milk which is bottled and sold as a fluid product (such as whole milk, skim milk, chocolate milk, etc.) is referred to as "Class I" milk. Under this Order¹, milk which is processed into food products (such as ice cream, cottage cheese, cheddar cheese, etc.), is referred to as "Class II", or "manufacturing" milk. Because the price established for "Class I" milk is always substantially higher than the price for "Class II" milk, "Class II" milk is also referred to as "surplus" or "reserve" milk.

¹.

Other Orders have additional classifications, which are not material here.

As indicated, handlers pay for their milk according to the use to which they put it. They do not pay the farmers directly, however; they pay the money to the Department of Agriculture's Market Administrator for each Order, who places the money in a fund known variously as the "producer settlement fund" or the "equalization pool". Out of that "fund" or "pool", the farmers are then paid a "blend price" which is somewhere between the Class I price and the Class II price in accordance with the "marketwide utilization"; i.e., the percentage which receipts from Class I purchases have to the total amount paid by handlers. While this may sound complicated, it is essentially a simple process: if one assumes a market in which one farmer sells one hundredweight of milk to a handler which is used for fluid milk (Class I) and one other farmer sells one hundredweight of milk to a handler which is used for manufacturing (Class II), the "marketwide utilization" is 50%. If the Class I price were \$10.00 and the Class II price were \$8.00, the total amount paid into the pool would be \$18.00, and each farmer would be paid \$9.00 from the Producer Settlement Fund for his sales. The \$9.00 is referred to as "the blend", or "the blend price":

<u>1 cwt. at \$10.00</u>	:	
Class I	:	
	:	\$18.00 ÷ 50% = \$9.00 to each
<u>1 cwt. at \$ 8.00</u>	:	farmer
Class II	:	

The Amendments which are attacked in this case changed the method used to establish the Class II price, i.e., the price which "handlers" must pay for milk to be processed into food products.

Prior to the Amendments which are involved here, the Class II price was established by the Secretary by using two alternative formulas: (1) the "basic formula price", otherwise known as the Minnesota-Wisconsin Series (hereafter the "M-W Series"); or (2) the "Butter-Powder formula". Until the 1974 Amendments, the Class II price was the lower price which the two alternative formulas produced.

The "M-W Series" is a formula whose components are held secret by the U.S.D.A., but which is said to be an average of the actual prices paid for milk by selected cheese plants in Minnesota and Wisconsin.

The "Butter-Powder" formula is a mathematical formula based upon the public prices paid for butter and dry skim milk ("powder") on the Chicago commodities exchanges.

The reason for these alternatives has been that most manufactured milk products can be made either out of milk or by blending butter and powder with water to make reconstituted milk; therefore, manufacturers of milk products will presumably use either milk or butter and powder, whichever is cheaper.

Over the years, these two formulas have produced pay prices which have been reasonably close to each other.

However, beginning in October 1973, largely as the result of Government export policies with respect to feed grains, Government import policies respecting dairy products, and the effect of Government-established price support levels, the M-W Series formula began to produce a price increasingly larger than the butter-powder formula did, causing the butter-powder formula to be the determinant of Class II prices.

Although the "blend prices" which farmers were getting for milk had increased 49% in Order 2 in one year from December 1972 to December 1973, and had also increased substantially in all other Orders in the Northeast (Tr. 886-87²), various farmer organizations saw the opportunity to further increase the "blend prices"--i.e., their members "take-home pay"--by removing the butter-powder formula as an alternative pricing mechanism for manufacturing milk.

They therefore requested the Secretary to hold a hearing to accomplish that objective. The Secretary granted that request; the result of the hearing was the Amendment to the Order which abolished the butter-powder formula as an alternative pricing mechanism for manufacturing milk, which Order is the subject of the present suit.

2.

Citations to "Tr." are to the Transcript of the Amendment Promulgation Hearing Record of February 20-28, 1974, which has been certified to the Court by the Department of Agriculture as Parts 2-4 of the Hearing Record; citations to "15(A) Tr." are to the Transcript of the hearing on the administrative appeal of these Plaintiffs under Section 15(A) of the Act, 7 U.S.C.A. §608c(15)(A), which was held in Philadelphia on July 1, 1974, and which was certified as Part I, Item 13 of the Record. Citations to "Rec." are to other items in the certified Record, as indicated.

C. History of the Case.

As a consequence of the requests from the farmer organizations, the Secretary issued a Notice of Hearing dated February 12, 1974, which was published in the Federal Register on February 14, 1974, and which announced that the hearing would commence on February 20--only six days later (Rec., Part 8, Item 8a).

Despite numerous protests as to the lack of adequate notice or time to prepare for hearings of such significance (see, e.g., Tr. 26), the hearings began as scheduled, and lasted for six hearing days--to February 28. Although two farmer organizations, National Farmers Organization and Pennmarva, urged immediate action to suspend the use of the butter-powder formula (Tr. 51, 202)--a procedure which was held to be illegal in Carnation Co. v. Butz, 372 F.Supp. 883 (D.D.C. 1974)--the vast majority of farmer organizations, although desiring ultimate removal of the butter-powder formula, denied the existence of any emergency which would justify deviation from the usual decision-making procedures required by the Department Regulations and the Administrative Procedure Act, 5 U.S.C.A. §551 et seq. (Tr. 332, 363, 377, 619-20, 812, 814-16, 853).

Nonetheless, the hearing proceeded on an "emergency" basis with the parties being given only eight days after the hearing concluded to file Briefs. Thereafter, the Department

waited 19 days--only five days less than the entire time which it had allowed the hearing participants from Notice of Hearing to Briefing deadline--before announcing on March 27, 1974, an "emergency" amendment to the Order to be effective six days later, which removed the butter-powder formula as an alternative method of pricing manufacturing milk until July 31, 1974 (Rec., Part 8, Item 8b). In effect, the M-W Series became the sole basis for pricing manufacturing milk, i.e., the alleged "average" price paid by manufacturing plants in Minnesota and Wisconsin became the minimum price which manufacturing plants in New York and New Jersey had to pay.³

The effect was a virtually immediate and massive increase in the costs of manufacturers of milk products.

On June 21, 1974, the Secretary, without taking any additional testimony, issued a Recommended Decision as to "long-term" pricing, i.e., pricing after July 31, 1974, which adopted the pricing scheme contained in the so-called "emergency" Order of March 27, and thereby made permanent the elimination of the butter-powder formula (Rec., Part I, Item 29). An Order implementing the Recommended Decision was issued on July 25, 1974 (Ibid.).

3.

Except for milk used in manufacturing butter and powder, as to which the butter-powder formula could be used so long as it did not result in a price more than 50 cents less than the price resulting from the M-W Series. This limited use of the butter-powder formula was eliminated in the "permanent" Order of July 25.

On April 8, 1974--promptly after the "emergency" amendment had gone into effect--Plaintiffs had filed an administrative appeal under Section 15(A) of the Act, 7 U.S.C.A. §608c(15)(A).⁴ The hearing on their appeal was held on July 1, 1974, in Philadelphia, before Administrative Law Judge John Campbell (15-A Tr., Rec. Part I, Item 13). Since the Recommended Decision on "long-term" pricing after July 31 had been announced just prior to the hearing, and was implemented by Order shortly thereafter, the Plaintiffs filed an Amended Appeal Petition appealing that Order as well (Rec., Part 1, Item 27). The parties then stipulated that the hearing record made on July 1, 1974, would apply to the "long-term" Order of July 25, 1974 (Rec., Part 1, Item 29).

On June 2, 1975, the Administrative Law Judge filed his Decision denying Plaintiffs' appeal (Rec., Part I, Item 40). Plaintiffs thereupon appealed directly to the Secretary pursuant to 7 C.F.R. §900.65(a) to reverse the

4.

Plaintiffs also filed an action in the United States District Court for the District of Columbia seeking a Preliminary Injunction against implementation of the Order: Crowley's Foods, Inc., et al v. Butz, Civil Action No. 74-516. The Court, on April 18, 1974, denied Plaintiffs a Preliminary Injunction on the ground that they had failed to make out a case for a preliminary injunction, and refused to review the issues now presented in this Court on the ground that it had no jurisdiction to do so prior to Plaintiffs' exhaustion of administrative remedies, under United States v. Ruzicka, 329 U.S. 287 (1946). The Complaint was subsequently dismissed for lack of jurisdiction under Ruzicka.

Decision of the Administrative Law Judge (Rec., Part I, Item 41). This appeal was denied on August 26, 1975 on behalf of the Secretary by the Departmental Judicial Officer (Rec., Part I, Item 44).

Having exhausted their administrative remedies, the Plaintiffs now appeal to this Court to secure the relief they have been denied by the Department.

DISCUSSIONI. The Defendant Violated Administrative Due Process and Statutory Provisions in Issuing These Orders.

As indicated above, an extremely expedited schedule was followed in producing the Orders which are attacked in this Case. The hearing began six days after notice appeared in the Federal Register, there were only six days of hearings, and one week was allowed for briefing. No tentative or recommended decision was announced, nor was opportunity given to the parties to file requested Findings and Conclusions; instead, a final Order was issued only six days prior to its effective date.

In rushing through this procedure, the Secretary failed to follow the appropriate provisions of the Agricultural Marketing Agreements Act or the Administrative Procedure Act.

The Agricultural Marketing Agreements Act requires that the Secretary "shall give due notice of and an opportunity for a hearing upon a proposed order": 7 U.S.C.A. §608c(3). The Act further requires that any Order must be based upon evidence produced at a hearing: 7 U.S.C.A. §608c(4).

The Administrative Procedure Act ("the APA") requires that there must be a recommended or tentative decision as a result of a hearing (5 U.S.C.A. §557(b)), and that

parties are entitled to submit exceptions to such a decision before the Order is made final: 5 U.S.C.A. §557(c)(2). It further provides that as a general rule, the Order must be published not less than thirty days before its effective date: 5 U.S.C.A. §553(d).

These are not only statutory requirements; they are elements of administrative due process, which requires (1) an opportunity to be heard, (2) due notice of the hearing, (3) fair conduct of the hearing, (4) support in the record for the decision, (5) submission by the Department of proposed findings and a tentative decision, and (6) an opportunity to be heard upon exceptions to the report: Ideal Farms, Inc. v. Benson, 181 F.Supp. 62 (D.N.J. 1960), aff'd 288 F.2d 608 (3d Cir. 1961), cert. denied 372 U.S. 965 (1963).

In United States v. Independent Bulk Transport, Inc., 394 F.Supp. 1319 (S.D. N.Y. 1975), Judge Frankel observed respecting administrative due process:

"By the terms of the statute, the defendant was entitled to 'notice and opportunity for a hearing.' In interpreting the meaning of these two essential components of due process, as a matter of constitutional law as well as when construing statutory language, courts have generally held that while due process is a flexible standard, the fair intendment of these two phrases, absent exigent circumstances, is a procedure which would apprise defendant of all the evidence to be considered and would give it a chance to rebut that evidence. See Wilner v. Committee on Fitness and Character, 373

U.S. 96, 103-06, 83 S.Ct. 1175 (1963);
Greene v. McElroy, 360 U.S. 474, 496-97,
 507, 79 S.Ct. 1400 (1959); Morgan v.
United States, 304 U.S. 1, 18-19, 58 S.Ct.
 773 (1938); Crowell v. Benson, 285 U.S.
 22, 47-48, 52 S.Ct. 285 (1932); Freitag v.
Carter, 489 F.2d 1377, 1382 (7th Cir.
 1973)." 394 F.Supp. 1322, n.6.

Moreover, in Carnation Co. v. Butz, 372 F.Supp.
 883 (D.D.C. 1974), which involved the Secretary's power to
 suspend pricing provisions in a Milk Marketing Order, the
 Court held that where a pricing Order has been so altered
 that a new Order materially differs from the old, the Act
 requires proper notice and hearing.

We submit that there is no material difference
 between a suspension without a hearing, and an Amendment made
 after a hearing in which no opportunity was given for
 preparation. A hearing without proper notice and opportunity
 for preparation is a sham hearing, involving but the slightest
 nod to the principles of Due Process and the requirements
 that Congress set forth in the statutes. We submit the
 Orders which resulted from this "hearing" are illegal ab
 initio because of improper notice.

In addition to giving inadequate notice of the
 hearing itself, the Department failed after the "hearing" to
 adhere to the above-cited requirements of the APA that pro-
 posed findings and a recommended decision be made; that an
 opportunity be given to file exceptions to the recommended

decision; and that the Order be announced 30 days before its effective date.

With respect to omitting a recommended decision and the opportunity to submit exceptions, the Department relied upon 5 U.S.C.A. §557(b)(2), which provides that:

"This procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires." (Emphasis added.)

To justify its lack of proper notice of the Order, the Department relied upon 5 U.S.C.A. §553(d)(3) that thirty-days' notice need not be given "for good cause found and published with the rule". (Emphasis added.)

It is clear from the wording of these two exceptions that, if an agency is to avail itself of them, it must make findings of fact supported by the record to justify its actions.

If one turns to the Department's findings on this question, one finds one page, consisting of two conclusory statements, and the balance merely quoting the statutory language of the APA exceptions cited above (Rec., Part 8, Item 8b, p.10). The Secretary states that "conditions in the aforesaid marketing areas are such that it is urgent that remedial action be taken as soon as possible", and that "it is necessary to correct at the earliest opportunity the disparity in alignment"; in neither case is there cited a

single fact to explain why such "urgency" existed; thus, the Secretary totally failed to make the findings necessary to justify evasion of the statutory requirements. It is not a sufficient finding for the Secretary to merely track the statutory language: Willow Farms Dairy, Inc. v. Freeman, 206 F.Supp. 239 (D. Md. 1962), rev'd other grds. 315 F.2d 828 (4th Cir. 1963).

Further, even if such findings had been made, the record would not support them. The vast majority of farmer groups, as well as all handler groups, testified on the record that there was no emergency justifying evasion of the usual decision-making process. The representative of Eastern Milk Producers, a major Northeastern cooperative consisting of 8,000 farmers (Tr. 280), testified that immediate imposition of the M-W Series would do "serious violence" to the entire dairy industry (Tr. 312, 331-32). After requesting the opportunity for a recommended decision, he stated further (Tr. 377):

"I think that unless it can be clearly shown that an emergency does exist, we ought to be very careful in using emergency proceedings in the Federal Order Program, and I have said this before."

Dr. Stewart Johnson, testifying for the New York-New England Dairy Coordinating Committee, representing 20,000 farmers (Tr. 587) urged no emergency decision, stating:

"This issue is being considered at a time when the manufacturing industry is

in a state of major disequilibrium...."
(Tr. 619-20).

Of all of the farmer groups who appeared, only two-- National Farmers Organization (NFO) and Pennmarva--neither of which has any significant dealings in the New York-New Jersey area, claimed that there was an "emergency". And that "emergency" was caused, according to those groups, not by ordinary economic events, but by action of the Government itself with respect to export and import policies, and the level of 1973 support prices (Tr. 53, 199-200, 318-30). Thus, the Government by "emergency" action was acting by this Order to remedy an "emergency" that it had created itself.

What the farmers essentially wanted was more money, i.e., an increase in the "blend prices". In fact, however, the blend prices had increased substantially over the previous year in all Federal Orders, and in particular in the Northeast Orders (Tr. 52, 95, 178-79, 211, 886-87, 963, 1093). In Order No. 2, they had risen 49% in one year (Tr. 886-87). Thus, farmer income had substantially increased, contradicting any claim of an emergency.

There was generalized testimony about increases in farmer costs; however, when the NFO representative was questioned as to what production costs were in the Northeast, and as to what the blend should be to cover those costs, he said he didn't know (Tr. 84, 92, 123), saying at page 92:

"We have sought from various governmental agencies, universities, to

determine actually what the cost of production is. We have not been able to find anyone who has figures that can tell us this."

The Pennmarva representative gave an opinion that costs had risen higher proportionately to the increase in the blend, but confessed to having no statistics to back up that statement (Tr. 212).

Thus, not only did the Secretary fail to make any factual findings justifying evasion of the Administrative Procedure Act's requirements; the Record would not support such findings had they been made.

We submit, therefore, that the "emergency" Order was illegal because it is based upon an improper and illegal procedure.

II. The Contents of the Order Are Totally Without Support in the Record.

We have discussed in the preceding section the question of whether there was established any emergency which would justify the deviation from the proper and ordinarily followed decisional procedure. Even if an emergency did exist - and we believe we have shown that it did not - the answer to the question "Is there an emergency?" is either "Yes, there is" or "No, there isn't."

This decision, having found that there was an emergency, then proceeded to do something about it; namely, to establish the Minnesota-Wisconsin Series as the sole basis for determining the Class II price. There was absolutely no evidence to justify the use of that Series.

As was indicated previously, the Minnesota-Wisconsin Series is a secret formula whose details are known only to the Department of Agriculture. It is said to be the average pay price which certain selected cheese plants located in Minnesota and Wisconsin --said to number from 110 to 300 plants-- pay for their milk (15(A) Tr., p. 55). These plants are totally unregulated, and not subject to Governmental control as are the Plaintiffs' plants.

There has developed in the industry substantial doubt that the Minnesota-Wisconsin Series has any validity as a basis for pricing milk (Tr. 472, 822-27). Nonetheless, the Department has adhered to it, while steadfastly refusing to

provide the details concerning it, including refusing to identify the plants which are included in the Series (15(A) Tr. 55); it is believed, however, that many of the plants are owned by farmer cooperatives, who in effect are paying themselves for the milk. It is further believed that the cooperatives which own these plants are involved in selling milk to handlers regulated by Federal Orders; those handlers pay those cooperatives on the basis of the Minnesota-Wisconsin Series. By charging themselves artificially high prices for milk used in their Minnesota and Wisconsin cheese plants, and then reporting those prices to the U.S.D.A., these cooperatives can succeed in rigging the Minnesota-Wisconsin Series, and thereby reap the profits from the prices which regulated handlers pay them under the Federal Orders.

Furthermore, it developed at the hearing that the U.S.D.A. makes absolutely no attempt to determine whether the pay prices which the Minnesota-Wisconsin plants are reporting, are in fact the prices which they are paying. Mr. Trelogan, of the U.S.D.A.'s Statistical Reporting Service, made the astounding admission that:

"We have no provision for verifying on a regular basis that the prices reported are actually paid." (Tr. 838).

Even those expert witnesses who testified for producer groups advocating the Minnesota-Wisconsin Series admitted that

they did not know the details of the Series (Tr. 112-13, 222, 373-74).

Because of the wide-spread belief that the Minnesota-Wisconsin Series is not a valid basis for determining prices, and because it was proposed to make the Minnesota-Wisconsin Series the sole basis for determining them, Motions were repeatedly made at the hearing for the production of material which would either justify the Series' use, or permit opponents of its use to show its invalidity (Tr. 187-93, 533-35, 730, 906). The Administrative Law Judge ruled that he had no power to direct the U.S.D.A. to do something it didn't want to do, but that he would treat the Motion as an on-the-record request to the Department (Tr. 187-93). No reply was made for several days.

When finally a response was made, the response was that the Department could not produce a witness qualified to testify about the M-W Series without at least two months of preparation (Tr. 838-40). Mr. Palmer, responding for the Department, denied the requests for the following reasons:

"Number one, that a qualified employee is not available for immediate appearance."

"And secondly, to make the kind of study [as to the details of the M-W Series] they requested would require considerable amounts of hand-sorting data from monthly and annual reports for a large number of plants and preparation of the requested information and testimony, a witness for testimony, would entail a period of approximately two months." (Tr. 840).

Yet the Department, which itself understands its own Series so poorly that two months' preparation of testimony would be required, had no hesitation to impose the Series upon the handlers as the sole price determinant for manufacturing milk--with six days' notice.

Since the only party having knowledge of the details of the M-W Series was unable to come forward to justify its validity, the record is totally devoid of any testimony which would justify its use.

The APA provides that reviewing courts shall hold unlawful and set aside agency action found to be unsupported by substantial evidence: 5 U.S.C.A. §706. It is axiomatic that an Administrative Decision and Order must be based upon facts developed at the hearing, or else it violates the Due Process rights of those affected adversely by it: Goldberg v. Kelly, 397 U.S. 254, 264, 271 (1970); Ohio Bell Tel. Co. v. Comm'n, 301 U.S. 292, 300, 302-03 (1937).

Similarly, the Agricultural Marketing Agreements Act requires that the Secretary issue a pricing order based upon evidence adduced at a hearing: 7 U.S.C.A. §608c(4). This means substantial evidence is required to support a milk-pricing order. See Fairmont Foods Co. v. Hardin, 442 F.2d 762, 772 (D.C. Cir. 1971); George Benz and Sons v. Hardin, 342 F.Supp. 88, 89 (D.C. Minn. 1972).

Substantial evidence has been defined as the relevant evidence that a reasonable person might accept to support a conclusion. Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-20, 86 S.Ct. 1018, 1026 (1966). It is more than a mere scintilla. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938). See K. Davis, Administrative Law, §29.01 at 996-97 (Supplement 1970). In Fairmont Foods Co. v. Hardin, 442 F.2d 762 (D.C. Cir. 1971), the Secretary of Agriculture had established by geographic area certain differentials on the price of milk paid to farmers. The facts did not support his action, but the Secretary contended that nonetheless his decision should be sustained so that market disruption would be precluded. (Not altogether suprisingly, the Secretary raised the same spectre of chaos below in this case as the basis for denying plaintiffs the normal notice and hearing procedure under the APA.) The Court of Appeals disagreed, saying that while administrative and executive expertise encompasses powers of analysis not possessed by others, such analysis "must be justified by reference to objective evidence." 442 F.2d at 772. Since the Court could not find a basis for the Secretary's findings "beyond mere speculation", the order was set aside: Ibid.

In Abbotts Dairies v. Hardin, 351 F. Supp. 561 (E.D. Pa. 1972), the District Court invalidated a milk pricing order of the Secretary of Agriculture upon a finding that there was "no objective evidence to support its validity..." 351 F. Supp. at 566.

In Abbotts Dairies v. Butz, 389 F. Supp. 1 (E.D. Pa. 1975), the Court held improper the action of the Secretary in issuing an emergency order temporarily suspending a "bracketed" milk-pricing formula, and subsequently terminating without a hearing that portion of the order making it temporary. Furthermore, the court found "the substantial evidence rule relied upon by the Judicial Officer for legitimatizing the Secretary's [pricing order] simply does not exist:" Id. at 8.

In Oak Tree Farm Dairy, Inc. v. Butz, 390 F. Supp. 852 (E.D. N.Y. 1975), this Court had occasion to consider the validity of a portion of a milk marketing order promulgated by the Secretary relating to "shrinkage." However, the case was remanded for further proceedings when this Court found itself unable to reach a decision on the merits due to insufficient findings of fact in the record. Specifically, this Court stated that "the administrative record in this case contains only fleeting and conclusory references to either of the issues sought to be adjudicated here:" 390 F. Supp. at 856.

After the promulgation hearing concluded, but before the hearing on Plaintiffs' administrative appeal, evidence came to light which substantiated the doubts as to the invalidity of the M-W Series, and the fears that it was subject to rigging by cooperatives. On May 31, 1974, Dwight Morris, a retired officer of Associated Milk Producers, Inc. (AMPI) --the largest cooperative in the country with extensive manufacturing operations in Minnesota and Wisconsin-- admitted under oath that the M-W Series had, in fact, been rigged. At pp. 94-100 of his deposition in United States v. AMPI, W. D. Mo. No. 74-CV80-W-1 (one of three cases also known as the Midwest Milk Monopolization Litigation, JMPL No. 83), Morris testified that AMPI had overpaid its Minnesota-Wisconsin members five cents per hundredweight, reported those prices to the U.S.D.A., and thereby earned hundreds of millions of dollars for their farmers nationwide (see attachment to Exceptions, incorporated by reference at Rec. Part I, Item 39, and Offer of Proof at 15(A) hearing, 15(A) Tr. 60-61). Plaintiffs attempted to offer this testimony in the 15(A) hearing, but were denied that opportunity (15(A) Tr. 69).

We cite this testimony as the type of evidence which Plaintiffs and others sought to explore in the promulgation hearing. Had the opportunity been allowed to

analyze the M-W Series on the record, this type of evidence might well have come out, thereby raising serious questions as to the Series' use; the important point is that the opportunity was not allowed, yet the M-W Series was adopted with no evidence produced to show the propriety of its use.

We have pointed out above the fact that the "long-term" Order of July 25, 1974, was based upon the "emergency" hearing record as to which inadequate notice was given, and that no additional testimony was taken. We suggest that it is a significant indication of the Department's respect for the hearing process that the "long-term" Order was issued over two months after the Morris testimony had received widespread publicity -- and without further hearings.

The fact that this Record does not support the validity of the M-W Series is acknowledged by the Department in its "long-term" decision of July 25, by the fact that it went to considerable extremes to justify the Series and attempt to answer the arguments that it was invalid by using evidence which was not made of record at the hearing, and which never was available for examination or cross-examination. Neither the discussion at page 6 of studies respecting "dual-intake" plants (including the incorporation of documents not made of record) nor the discussion of the Series as a "free market pay price" (without any evidence as to competitive conditions

in Minnesota and Wisconsin) are supported by any evidence in the record. This is no more nor less than an attempted after-the-fact justification of an incomplete record. We point out further a serious inconsistency in the Department's position on after-hearing evidence: while incorporating into its decision an after-hearing document (the April 1, 1974 issue of Agricultural Prices), the Department vociferously (and successfully) objected to the introduction of the Dwight Morris testimony about rigging the Series, on the ground that after-hearing evidence could not be considered (15(A) Tr. 56, 59-62, 67-69).

Furthermore, the very basis of the Secretary's decision is not properly in the record. The Secretary justified his Order by claiming that there was a need to "align" the prices of manufacturing milk in the Northeast Orders, with prices in other Orders. There are, indeed, other Milk Marketing Orders in which the sole price determinant is the M-W Series; but it should be noted that the Department's decision to use the M-W Series in the other markets was arrived at only the day before the hearing in the present case was convened (15(A) Tr. 36-37). In that case, which was based on a hearing record three years old, the Department had reached a Recommended Decision to retain the butter-powder formula in those Orders which had it (15(A) Tr. 37). The final decision-- announced the day before the hearing in the present case began --reversed without notice

the Recommended Decision (15(A) Tr. 37). In fact, the Department refused to make available copies of the decision and Order in that case to the participants in this hearing, until after this hearing was concluded (15(A) Tr. 45, 48-49).

This action by the Department was highly material to the Due Process rights of the parties at the hearing; had the parties had a copy of the Decision they would have been more able to prepare their cases and present them at the hearing, and to cross-examine witnesses (15(A) Tr. 45, 48-49). As it turned out, a Decision which no one at the hearing had seen, became the basis of the Decision in the present case.

In passing the Agricultural Marketing Agreements Act, Congress made it clear that it was "not conferring ultramassed discretion on the Secretary and authorizing him to proceed in a vacuum:" Zuber v. Allen, 396 U.S. 168, 185, 90 S. Ct. 314, 324 (1969). See Brannan v. Stark, 342 U.S. 451, 469, 72 S. Ct. 433, 440 (1952); Blair v. Freeman, 125 U.S. App. D.C. 207, 370 F.2d 229, 235-236 (1966). The District of Columbia Court of Appeals has said that administrative expertise is strengthened, not crippled by a requirement of substantial evidence: Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Dir. 1970), cert. denied, 406

U.S. 950 (1972). Furthermore, the Supreme Court has warned.

"Expert discretion is the life blood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 167-168, 83 Supreme Court 239 (1962). (Emphasis in original).

In Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz, 389 F. Supp. 1 (E.D. Pa. 1975), the Court pointed out in detail the purpose of administrative hearings:

"The purpose of requiring the Government to produce evidence at a hearing is two-fold. First, it will create an evidentiary record on which the Secretary can make his findings based on clear and rational choices. It allows a court to understand the basis for the Secretary's decision and intelligently rule on whether the decision is lawful and supported by substantial evidence."

"Secondly, to require the introduction of evidence by the Government and force it to reveal publicly the facts which form the basis for the Secretary's decision allows interested parties to test, refute, rebut or buttress these facts. This is what a fact-finding hearing is all about. It is an educational process, not only for the Secretary, but also for the public, Congress and the courts so that ultimately the best decision is made. For the Secretary to hide the facts behind a facade of administrative expertise would be to frustrate the Congressional intent of the Agricultural Marketing Agreement Act and the Administrative Procedure Act. The facts could then never be challenged, never tested. Ultimately, the absence of facts would result in incestuously perverting administrative integrity and public confidence in Government." 389 F. Supp. 10-11. (Emphasis added).

The declared policy of the Agricultural Marketing Agreements Act is to maintain an orderly market to protect producers and consumers, 7 U.S.C.A. §602. In order to find that an order will tend to effectuate this policy of the Act, the Secretary must give reasoned consideration to all material facts and issues. It is incumbent that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts: Greater Boston Television v. FCC, 444 F. 2d 841, 851 (D.C. Cir. 1971), cert. denied, 406 U.S. 950, 92 S. Ct. 2052 (1972). There must be a rational basis on the record to support the Secretary's decision: Fairmont Foods Co. v. Hardin, *supra*, 442 F.2d at 771. The facts necessary to support the inferences in findings must be in the record: Zuber v. Allen, 396 U.S. 168, 193, 90 S. Ct. 314, 328 (1969); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167, 83 S. Ct. 239, 244 (1962); Blodgett Uncrated Furniture Service, Inc. v. United States, 288 F. Supp. 591, 599 (W.D. Mich. 1968). Furthermore, the Supreme Court has admonished that the reviewing court cannot accept "post hoc rationalizations for agency action." Burlington Truck Lines, Inc. v. United States, *supra*, 371 U.S. at 168, 83 S. Ct. at 246.

In summary, even assuming the Secretary correctly found the existence of an emergency, the substantive provisions of his Order are totally without support in the Record, and violate the provisions of the Act.

III. The Orders Violated the Statutory Requirement That Local Conditions Be Reflected in Marketing Orders.

As indicated, the sole reason advanced in the Secretary's Decision to use solely the M-W Series was to align the price of manufacturing milk in the Northeast Orders (ranging from Indiana to Boston) with the prices in other areas regulated by Federal Orders, and unregulated areas (Order, 15(A) Tr. 14-16; Order of July 25)

In fact, however, the "unregulated areas" constitute primarily Minnesota and Wisconsin, which is the major source of unregulated milk in the country. Thus, what in fact the Secretary has done is to remove the competition which manufacturing plants using butter and powder could provide for the Minnesota-Wisconsin plants. By insulating those plants from competition, they are now freer even than before to establish whatever they want as a pay price for milk, and therefore to set the Minnesota-Wisconsin Series as the price for which they sell their regulated milk into Federal Order areas. This was precisely the reason advanced by the National Farmers Organization in support of their request that the Secretary do what he has now done (Tr. pp. 64-65, 144, 1054, 1073-74). Furthermore, for the reasons set forth below, the effect is not only to remove competition with the unregulated Minnesota-Wisconsin plants, but to give them a substantial competitive advantage over regulated plants in

the Northeast.

Plants in Minnesota and Wisconsin are unregulated. Thus, they do not have to pay the 3-1/2 cents per hundred-weight assessment which Order No. 2 handlers must pay to finance the operations of the U.S.D.A. Market Administrator's office: 7 C.F.R. Part 1002.

Because they purchase milk F.O.B. plant, Minnesota and Wisconsin plants do not have to pay the cost of transporting milk from the farm; Order No. 2 handlers, on the other hand, must pay F.O.B. farm, and the handling allowance they are allowed under the Order is not sufficient to cover the cost of transportation, which runs 17 cents per hundred-weight (Tr. 432, 462).

Thirdly, and perhaps most importantly of all, Minnesota and Wisconsin plants are able to obtain more product from their milk than are Northeast manufacturers due to a difference in the chemistry of the milk: M-W plants are able to get 1/2-3/4 of a pound more cheese out of a hundredweight of milk than are Northeast manufacturers (Tr. 432-34). The result is that New York plants - which processed 700 million pounds of milk into cheese in 1973 (Tr. 435) - generate 65-67 cents less revenue from 100 pounds of milk than do Minnesota and Wisconsin plants (Tr. 439). Assuming an equivalent amount of production in Minnesota and Wisconsin, the disadvantage in production

cost due to yield differences alone (without regard to the assessments and hauling costs referred to above) is \$4.5 million.

Minnesota and Wisconsin cheese plants market their products in the Northeast (15(A) Tr. 85); given these immense competitive disadvantages, plaintiffs are faced with ruinous competition from sources benefitting from this Order.

Even assuming, arguendo, the existence of a need to align prices among Federal Orders, the standards set forth in the Act were not allowed. The Act makes clear that Orders are not to be nationally uniform, but must be adjusted area-by-area to take into account differences in marketing, costs and other economic factors.

With respect to Orders generally, the Act provides, in 7 U.S.C.A. §608c(11):

"(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter."

.....

"(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production

and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas." (Emphasis added).

With respect specifically to Orders fixing the prices of milk, the Act reinforces this requirement:

"Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers." 7 U.S.C.A. §608c (5)(a) (Emphasis added).

Notwithstanding the directions of the above statutory provisions that consideration is to be given to different economic conditions in different marketing areas, the Decision and Order in this case makes no attempt to consider such different situations, despite evidence that there were in fact substantial differences in costs of production in the Northeast from other areas (Tr. 432-62).

The record is totally devoid of any evidence that marketing conditions throughout the nation are uniform, which might justify the imposition of a uniform pricing mechanism. While there were general statements made by producer witnesses that farmers' costs had increased on a nationwide basis (Tr. 53), no testimony was placed on the record as to costs in the Northeast; the primary spokesman for "emergency" relief

admitted he had no knowledge of costs in the Northeast (Tr. 84, 92, 123).

Thus, what this Decision and Order accomplishes is exactly what the Act says should not be done - it establishes a nationwide price with no recognition of regional differences.

CONCLUSION

The Orders of the Secretary in the case at bar are totally without support in the administrative record, violate the substantive provisions of the Act and were issued in violation of plaintiffs' statutory right to a full and fair hearing with adequate notice. As such, they fall short of the legal requirements mandated by both the Agricultural Marketing Agreements Act and the Administrative Procedure Act. We respectfully urge the Court to grant the Plaintiffs' Motion for Summary Judgment and to vacate the 1974 Amendments to Federal Order No. 2.

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DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
IN THE UNITED STATES DISTRICT COURT

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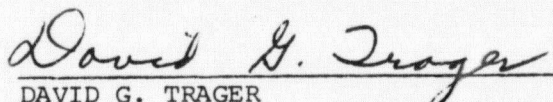
FOR THE EASTERN DISTRICT OF NEW YORK

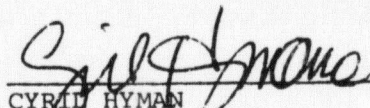
FRIENDSHIP DAIRIES, INC., ET AL.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	NO. 75 CIV. 1517
	)	
EARL BUTZ, SECRETARY OF	)	
AGRICULTURE,	)	
	)	
Defendant	)	

Defendant's Motion for Summary Judgment

Defendant, Earl Butz, Secretary of Agriculture of the United States of America, by his under signed attorney, hereby moves the Court for Summary Judgment in his favor pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that the record before the Court reveals that there is no disputed issue of fact in this case and the judgment should be granted for defendant as a matter of law.

In support of this Motion, the Court is respectfully referred to the administrative record filed as part of this appeal and defendant's Brief in Support of Its Cross Motion for Summary Judgment.


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DEFENDANT'S STATEMENT PURSUANT TO RULE 9(g)

CIS:CH:sr UNITED STATES DISTRICT COURT
F.752110 EASTERN DISTRICT OF NEW YORK

-----X
FRIENDSHIP DAIRIES, INC., et al.,

Plaintiffs,

-against-

EARL BUTZ, SECRETARY OF
AGRICULTURE,

Defendant.

DEFENDANT'S STATEMENT
PURSUANT TO RULE 9(g)
OF THE GENERAL RULES
OF THIS COURT

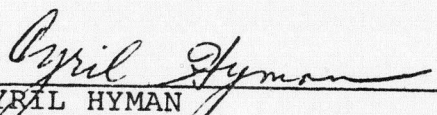
Civil Action No.
75 C 1517

-----X
That the facts contained in the initial decision
of the Administrative Law Judge and adopted as a final
decision of the Judicial Officer contains the statement of
material facts as to which the defendant herein, the Secretary
of Agriculture, contends there is no genuine issue to be tried.

Dated: Brooklyn, New York
September 29, 1976.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION
(pp. 1415a-1450a)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FRIENDSHIP DAIRIES, INC., ET AL.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	NO. 75 CIV. 1517
	)	
EARL BUTZ, SECRETARY OF	)	
AGRICULTURE,	)	
	)	
Defendant	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
CROSS MOTION FOR SUMMARY JUDGMENT

Statement of the Case

This suit arises as the result of regulation by the Secretary of Agriculture of the sale of milk under the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601 et seq., (The Act) and the Federal Milk Marketing Orders promulgated thereunder. The plaintiffs herein are all milk processors located in the New York-New Jersey area who directly or indirectly purchase milk which is subject to regulation under the provisions of Federal Order No. 2 (7 CFR Part 1002). Plaintiffs are seeking the Court's review of a ruling by the Judicial Officer ^{1/} of the Department of Agriculture which dismissed Petitions filed by them, pursuant to 7 U.S.C. 608c(15)(A), (15(A) Proceeding) of the Act challenging the Secretary's decision to amend Order No. 2 along with seven other milk marketing orders located in

^{1/} The Judicial Officer has been duly delegated to act for the Secretary in these matters. See Brown v. United States, 367 F.2d 907, 911 (10th Cir. 1966); cert. denied, 387 U.S. 917 (1967).

2/

the northeastern United States . In accordance with the statutory provision for administrative review and regulations (7 CFR 900.50 et seq.), plaintiffs were first afforded an oral hearing before an Administrative Law Judge. Upon consideration of the evidence and the briefs filed by the parties, the Administrative Law Judge issued a decision denying the relief plaintiffs sought. The plaintiffs appealed that decision to the Department's Judicial Officer who, upon review of the record, concurred with the decision of the Administrative Law Judge and, accordingly, adopted that decision as his final decision.

The suit now before the Court was commenced by the filing of a complaint pursuant to section 608c(15)(B) of the Act (7 U.S.C. 608c(15)(B)). The Secretary has answered the complaint and caused to be filed with the Court certified copies of the Judicial Officer's ruling and the record upon which it is based.

In this statutory appeal proceeding, the function of the Court is to determine whether on the record before the Judicial Officer his ruling was "not in accordance with law" (7 U.S.C. 608c(15)(B)). United States v. Mills, 315 F.2d 828, 836 (4th Cir. 1963), cert. denied, 375 U.S. 819; New York State Guernsey Breeders Coop. v. Wickard, 141 F.2d 805 (2nd Cir. 1944), cert. denied 323 U.S. 725 (1944); Oak Tree Farm Dairy, Inc. v. Butz, 390 F.Supp. 852 (D.C.N.Y. 1975); C. J. Wieland & Son Dairy Products Company v. Wickard, 68 F. Supp. 93 (E.D. Wisc. 1946); Bailey Farm Dairy Company v. Jones, 61 F. Supp. 209 (E.D. Miss. 1945), aff'd 157 F.2d 87 (8th Cir. 1946), cert. denied 329 U.S. 788 (1946).

2/ The other orders amended were: Boston Regional - 7 CFR Part 1001; Middle Atlantic - 7 CFR Part 1004; Connecticut - 7 CFR Part 1015; Ohio Valley - 7 CFR Part 1033; Eastern Ohio-Western Pennsylvania - 7 CFR Part 1036; Southern Michigan - 7 CFR Part 1040; Indiana - 7 CFR Part 1049.

The ruling of the Judicial Officer is final and conclusive if there is substantial evidence in the administrative record supporting such ruling, and the Court may not weigh the evidence and substitute its independent findings for those of the Judicial Officer. Gray v. Powell, 314 U.S. 402 (1941); Cardillo v. Liberty Mutual Company, 330 U.S. 469, 477-478 (1947); Queensboro Farm Products v. Wickard, 137 F.2d 1969 (2d Cir. 1943); Beatrice Creamery Company v. Anderson, 75 F.2d 363 (D. Kan. 1947); Clark v. Portland General Electric Company, 111 F.2d 703 (9th Cir. 1940); Potomac Electric Power Company v. Cardillo, 107 F.2d 962 (D.C. Cir. 1939); Bethlehem Ship Building Corporation v. Cardillo, 102 F.2d 299 (1st Cir. 1939).

A trial de novo cannot be conducted nor may any new issues be interjected in this review proceeding. Lewes Dairies, Inc. v. Freeman, 401 F.2d 302, 315-317 (3rd Cir. 1968), cert. denied 394 U.S. 929 (1969). New York Guernsey Breeders Coop. v. Wickard, supra; Queensboro Farm Products v. Wickard, supra; Beatrice Creamery Company v. Anderson, supra.

The role of the District Court is quite narrow; it must assure itself that the petitioning party has been accorded due process in the administrative proceeding. In so doing, the administrative record is reviewed to determine whether the decision rendered therefrom is supported by substantial evidence. The District Court is not free to draw its own independent references and conclusions from the record. Lewes Dairy, Inc. v. Freeman, supra at 317.

Economic Background and Operation of Federal Milk Marketing Orders

This case arises out of the regulation of the milk industry, the economy of which the Supreme Court has stated, "is so eccentric that the economic controls have been found at once necessary and difficult." H. P. Hood & Sons v. Dumond, 336 U.S. 525, 529 (1949). The factors

which render such regulation imperative have been explained in detail in Nebbia v. New York, 291 U.S. 502, 516-518 (1934), and United States v. Rock Royal Coop., 307 U.S. 533, 549-550 (1939). A brief summary of the economic background of the Act and operation of a milk marketing order is presented here to aid the Court in understanding the underlying regulatory scheme. The statute involved in this case is the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.). The purpose of the statute is to achieve marketing conditions for agricultural commodities which will guarantee farmers parity prices as defined by law, protect the interests of consumers, and establish and maintain orderly marketing conditions. 7 U.S.C. 602. The purpose of the Act is accomplished by the issuance of Federal marketing orders in accordance with 7 U.S.C. 608c. The Act provides that, before an order is issued, notice must be given and a hearing must be held. The Secretary of Agriculture may issue the order only if he finds upon evidence submitted at the hearing that the order will tend to effectuate the declared policy of the Act. 7 U.S.C. 608c(4). Before an order or an amendment of an order becomes effective, it must be approved by a specified percentage of producers. 7 U.S.C. 608c(9)(B). The Secretary must suspend or terminate an order or a provision thereof if he finds that the order or provision obstructs or does not tend to effectuate the policy of the Act. 7 U.S.C. 608c(16)(A). Suspension or termination of an order is also mandated by the Secretary if a majority of the producers under a given order so request. 6 U.S.C. 608c(16)(B).

To fully comprehend the necessity for regulating the handling of milk, it is necessary to understand the singular difficult problems of the dairy industry. Fluid milk must be consumed relatively quickly after it is produced because it is naturally "a fertile field for growth

of bacteria". United States v. Rock Royal Coop., supra 549. If it cannot be marketed quickly in fluid form, it must be "manufactured" into cheese, butter or other milk products which can be stored for considerable periods. This milk, which cannot be disposed of in fluid form, is referred to in the trade as a reserve supply or "surplus". Surplus milk commands a lower price on the market than fluid milk because it must be manufactured into milk products that must compete directly with similar products from across the nation, often manufactured from milk of lower quality and in "low cost production areas far removed from metropolitan centers". United States v. Rock Royal, supra, at 550.

Naturally, every farmer would prefer to sell his milk to the high value fluid users. This desire cannot be fulfilled for several reasons. First, the daily demand for fluid milk varies considerably. If the distributors (handlers) are to meet this varying demand, supplies of reserve milk must always be available. That portion of the additional supplies not actually needed and used in fluid form is, of course, "surplus" to fresh beverage needs.

Under the best practical adjustment of supply to demand, the industry must carry a surplus of about 20 percent, because milk, an essential food, must be available as deemed by consumers every day in the year and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. . . . Nebbia v. New York, 291 U.S. 502, 517.

Second, dairy cows produce more milk in the spring, the "flush" season, than they do in the fall. Dairy herds sufficient to produce a supply of milk adequate for consumer needs in the fall produce a superabundance in the spring. Because of this and delivery requirements, there is always surplus milk, although the amount of surplus may vary between markets.

In the early 1930's, the availability of this surplus milk for sale in the more profitable fluid market resulted in extreme, cut-throat competition which engendered business practices that jeopardized "the quality and in the end the quantity" of the vital fluid milk supply. United States v. Rock Royal, *supra*. The provisions of the Agricultural Marketing Agreement Act relating particularly to the milk industry were enacted as "the result of a nationwide distress which had culminated in a milk farmer 'strike' accompanied by violence and constituting an incipient agrarian revolution that threatened to cutoff a vital part of the Nation's food supply." Queensboro Farm Products v. Wickard, 137 F.2d 969, 974 (C.A. 2, 1943). The Act in great part, tends to alleviate this problem of the dairy industry by authorizing the issuance of Orders regulating the marketing of milk. Such Orders may set the minimum price which handlers must pay for milk and also provide a method by which the desirable fluid milk market and the burden of the "surplus" milk may be thoroughly and proportionately shared among all the dairy farmers supplying the market.

A satisfactory stabilization of prices that fluid milk requires is the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressures to market surplus milk in fluid form will be a serious disturbing factor. Nebbia v. New York, 291 U.S. 502, 517-518.

The Act provides that classification of milk in accordance with the form in which or for the purpose in which it is used, and for the fixing of minimum prices for each class of use. The basic minimum class price for milk must be the same for all companies (handlers). The prices may be subject to differentials that reflect such things as transportation costs and extra quality, 7 U.S.C. 608c(5)(A). The minimum prices set by

the Secretary such as he finds will reflect the prices and available supply of feeds and other economic condition which affect market supply and demand for milk in the marketing areas, insure sufficient quantity of pure and wholesome milk and be in the public interest (7 U.S.C. 608c(18)). See, United States v. Rock Royal Coop., supra; H. P. Hood & Sons v. United States, 307 U.S. 588 (1939).

The fluid milk sale and the surplus burden are distributed proportionately among the dairy farmers engaged in production of milk for the marketing area by means of a "market-wide pool" as explained in Grant v. Benson, 229 F.2d 765, cert. denied 350 U.S. 1015, as follows:

The purpose of the Order is to establish uniform minimum prices to be paid to producers. The first aim is achieved by setting uniform minimum prices for each milk use classification, such as fluid milk, cream and various manufactured milk products. Thus the price paid by the handler is geared to the use which he makes of the milk. In contrast, the marketing plan is designed to give the producer a uniform price for all the milk he sells regardless of the use made of it by the handler who purchases it. Several steps are involved in reaching this uniform price. The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. The amount is decreased or increased by several subtractions or additions, including a deduction for payments to cooperatives. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payment at the uniform price is required to apply the difference into an equalization or a producer-settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdrawal of the amount of the difference from the equalization or producer fund. Thus a composite or uniform price is effectuated by means of an equalization to the producer-settlement fund.

Even though the farmer or producer has no control over the ultimate utilization of his milk once it enters a handler's milk plant, the producer, nevertheless, is assured of sharing equally with all other producers in the value returned on Class I use in the market. Market-wide pooling through the producer-settlement fund, equates the burden of necessary market reserves and seasonal surpluses always prevalent in the market. This pooling procedure was discussed and approved by the Supreme Court in United States v. Rock Royal Coop., supra.

It must be emphasized that the Order prices set under the Act are minimum prices only. Producers need not sell their milk for the minimum prices; they can and do bargain for effective prices which are above order minimums; however, they must be paid at the least the minimum prices under the order. The Secretary has authority under the Act to enforce order minimum prices only, and he cannot enforce above order prices agreed to between handlers and producers.

Although the regulatory scheme under the Act regulates handlers the statutes basic purpose is to protect producers by way of insuring them minimum prices with various adjustments of those prices as permitted under the Act.

Several of the Plaintiffs in this Action
Lack Standing before this Court to Chal-
lenge the Secretary's Amendment of Order
No. 2.

I. The Judicial Officer in his decision found that based upon the record evidence (Pleadings; 15-a Tr. pp. 7, 11, 26-27; R. pp. 431-432)^{3/}

^{3/} As indicated above the Initial Decision of the Administrative Law Judge was adopted verbatim as the Final Decision of the Judicial Officer, with the exception of some minor grammatical changes. Therefore, when discussing the "Judicial Officer's Decision", we are referring to the decision of the Administrative Law Judge as adopted by the Judicial Officer. Accordingly, we will adopt the same references to the record used by the Administrative Law Judge. Reference to the transcript pages, exhibits, briefs and affidavits pertaining to the July 1 hearing will include the prefix "15-A". Reference to the rulemaking proceeding will be prefixed by the letter "R".

that "The plants of Cuba Cheese Company and Polio Dairy Products Corporation, are not 'pool plants' and are not subject to the pooling provisions of Order No. 2, but purchase their milk from pool plants or cooperative associations." The Judicial Officer did not dismiss these parties from the administrative proceeding below because he apparently believed they had an interest in the outcome of that proceeding and were joined with parties who could properly challenge the amendment to Order No. 2. However, since their continued presence in this suit runs contrary to existing case law the government feels compelled to raise the issue of jurisdiction at this time.

In Associated Data Processing Service Associations v. Camp, 397 U.S. 150, (1970), the Supreme Court established that non-reviewability of an action is the exception rather than the rule, but it held that Congress could decide the question one way or the other, 397 U.S. at 166. Under section 608c(15)(B) of the Act, Congress specifically granted standing only to handlers to seek Court review of the provisions of milk marketing orders. Plaintiffs Cuba Cheese and Polio Dairy are not "handlers" under the provisions of Order No. 2 in that they do not operate pool plants and are in no way subject to regulation under the Order. Granted plaintiffs' suppliers may be subject to regulation but this does not alter their status. Cuba Cheese and Polio Dairy are no different than any other consumer in the marketing area who purchases milk from regulated handlers and the Court in Rasmussen v. Hardin, 461 F.2d 595, 598-600 (9th Cir. 1972) specifically found that consumers do not have standing to challenge the provisions of milk marketing orders. Therefore, plaintiffs Cuba Cheese and Polio Dairy have no standing to challenge the amendment to Order No. 2 and should be dismissed from these proceedings.

II. Plaintiffs Friendship Dairies, Inc., Crowley Food, Inc., Saratoga Dairy, Inc. and Deltown Foods, Inc., are regulated handlers under Order No. 2. However, none of these parties are either an inhabitant nor do they have their principal place of business located within the Eastern District of New York. Section 608c(15)(B) clearly states:

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such rulings. . . .

While judicial economy would dictate that the interests of all parties similarly affected by the Secretary's amendment of Order No. 2 should have their challenges litigated in one forum, that alone should not permit plaintiffs to expand the statutory limits of jurisdiction in contravention of the plain jurisdictional limits set forth in section 608c(15)(B). If those plaintiffs are allowed to remain in this action, there will be created a precedent which will be the source of continuing conflict in future suits under 7 U.S.C. 608c(15)(B). Accordingly, these plaintiffs should be dismissed from this suit.

Issues

On March 27, 1974, the Secretary of Agriculture issued a "Partial Decision on Proposed Amendments to Marketing Agreements and Orders" 39 F.R. 11567, (Partial Decision) amending eight milk marketing orders in the Northeastern United States. The Partial Decision was issued as a temporary amendment to be effective from April 3, 1974, through July 31, 1974, and was based upon evidence received at a hearing held in Washington, D. C., on February 20 through 28, 1974 (Rulemaking Hearing). That Partial Decision stated that the Secretary had determined that there was an emergency which warranted the omission of a recommended

decision and the requirement of 30-days publication prior to the effective date. The Secretary also determined that the price for reserve milk disposed in manufacturing uses other than butter and nonfat dry milk should be based on the announced Minnesota-Wisconsin series price (M-W series price)^{4/} and that the milk utilized to manufacture butter and nonfat dry milk should be priced below the M-W price by the amount, not to exceed 50 cents, that the butter-powder formula price (b-p price)^{5/} is less than the M-W series price. On July 25, 1974, the Secretary issued his decision on the permanent amendment of the eight Northeastern milk orders (39 F.R. 27678) (Permanent Amendment Decision) in which he determined that the M-W price should be the sole pricing determinant for reserve milk under those orders.

Plaintiffs initially challenged the Partial Decision and permanent amendment decision of Order No. 2 on a number of grounds in their Complaint; however, it appears that from their Memorandum of Law In Support of Their Motion for Summary Judgment they have now restricted their challenge to the following grounds:

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- ^{4/} A price derived from the estimated average price paid for milk received at manufacturing plants for the proceeding or base month and an estimated change from the base month. The level for the base month, which is used as a benchmark, is based on reports of pay prices from survey of approximately 340 manufacturing plants in Minnesota and Wisconsin. These plants are not subject to federal price regulations and their reports are furnished voluntarily and conditioned upon being held confidential.
- ^{5/} A price computed by considering the market quotations for butter and nonfat dry milk powder on the Chicago market. On the basis of the amount of butter and powder that a hundred pounds of milk will normally yield, a price is derived for a hundred pounds of milk so utilized less a sum considered to be the cost of converting the milk into butter and powder.

1. The Defendant Violated Administrative Due Process and Statutory Provisions in Issuing These Orders.
2. The Contents of the Order are Totally Without Support in the Record.
3. The Orders Violated the Statutory Requirement That Local Conditions Be Reflected in Marketing Orders.

These are the same challenges raised in the 15-A proceeding below and inasmuch as the decision of the Judicial Officer fully deals with all allegations raised by plaintiffs, we shall set forth appropriate portions of that decision for emphasis to the Court and will provide only that additional comment which may assist the Court.

I. The Secretary in Promulgating the Temporary and Permanent Amendments to the Eight Northeastern Marketing Areas Properly Complied With All Requirements of Administrative Due Process and the Statutory Provisions of the Act.

A. Plaintiffs take issue with the time allowed between the Notice of Hearing published in the Federal Register on February 14, 1974 and the commencement of the proceedings on February 20, 1974 as being too brief to allow them to properly prepare for the rulemaking hearing. The Judicial Officer ruled upon this allegation on pages 37-38 of his decision as follows:

Petitioners' allegation that the Secretary of Agriculture violated section 608c(3) of the Act by failing to give due notice of and opportunity for a hearing is without merit. The notice was issued February 12, was published February 14, 1974, and the hearing began on February 20, 1974. As provided in 7 CFR 900.4(a) of the Rules of Practice governing the conduct of amendment hearings under the Act.

. . . In the case of hearings on amendments to marketing agreements or marketing orders, the time of the hearing may be less than 15 days but shall not be less than 3 days after the date of publication of notice in the Federal Register.

Likewise section 608c(17) of the Act provides for 3 days notice for amendments to Federal Orders.

The Secretary's decision to call an amendment hearing on 5 days notice was deemed sufficient in Ideal Farms, Inc. v. Benson, 181 F.Supp. 62 (D.C. N.J. 1960) aff'd 288 F.2d 608, cert. denied 372 U.S. 965. See also, Carnation Company v. Butz, 372 F.Supp. 883, 889 (D.D.C. 1974) where the Court urges the Secretary's use of the 3-day notice period contained in section 8c(17) of the Act in preference to other means of expedited action.

There was evidence (k. pp. 25-26, 946) that some of these petitioners were also notified by mail from the Market Administrator's Office that the amendment hearing was forthcoming as early as February 4, 1974. The fact that all the petitioners entered their appearances through counsel or other representatives at the hearing and participated extensively, nullifies their contention that the published notice did not provide them sufficient notice. As stated in United States v. Wrightwood Dairy Company, 127 F.2d 907, 910 (C.A. 7, 1942) regarding adequate notice under 7 U.S.C. 608c(3): "If the purpose of the hearing was clear, and everyone knew of the general considerations, no more was needed."

B. In response to plaintiffs' arguments that the Secretary's amendments to the eight northeastern marketing orders violated various provisions of the Administrative Procedure Act (5 U.S.C. 551 et seq.) the Judicial Officer found beginning at page 38 of his decision:

Petitioners further urge that the Secretary's decision to issue the temporary amendment on an emergency basis omitting a "recommended or tentative decision"; opportunity to submit exceptions to that tentative decision; and the normal 30 day period between publication and effective date, violated procedural requirements of 5 U.S.C. §§ 557(b), 557(c)(2) and 557(3)(d).

However, 5 U.S.C. 557(b)(2) clearly states with respect to a recommended decision:

This procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

In regard to the requirement of publication 30 days prior to the effective date, it is provided in 5 U.S.C. 553(d)(3) that such publication may be omitted for "good cause found and published with the rule." The Secretary of Agriculture, upon consideration of the evidence submitted at the hearing held between February 20-28, 1974, found and stated in his decision of March 27, 1974, as follows:

The due and timely execution of the function of the Secretary under the Act imperatively and unavoidably requires the omission of a recommended decision and opportunity for exceptions thereto on issue No. 1 [the immediate need for making inoperative b-p formula]. The current marketing conditions in the aforesaid marketing areas are such that it is urgent that remedial action be taken as soon as possible. It is necessary to correct at the earliest opportunity the disparity in alignment of reserve milk prices under the 8 orders with the order prices in the midwest as well as the prices being paid for manufacturing grade milk. Accordingly, requests for the recommended decision are denied.

Petitioners attack this finding on the grounds that it is not sufficient for the Secretary to merely paraphrase statutory requirements in his decision and cite for authority Willow Farm Dairy's, Inc. v. Freeman, 206 F.Supp. 239 (D. Md. 1962). That case, under the caption United States v. Mills, 315 F.2d 828, 833 (C.A. 4, 1963) cert. denied 375 U.S. 819 was reversed and the courts specifically stated that as long as the Secretary's decision had firm basis in the record, the mere fact that it paraphrased statutory language will not invalidate it. Here, however, the Secretary's decision of March 27, 1974, did in fact fully discuss the evidence submitted at the hearing which demonstrated the existence of an emergency.

The discussion referred to by the Judicial Officer appears in the Partial Decision at 39 Federal Register 11567-11568, which was published on March 29, 1974, and states in pertinent part:

FINDINGS AND CONCLUSIONS

The following findings and conclusions on the material issues are based on evidence presented at the hearing and the record thereof:

1. *The immediate need for making inoperative the butter-powder formula under each order during the next few months.* The price for reserve milk disposed of in manufacturing uses other than butter and nonfat dry milk in the eight markets under consideration should not be based on the butter-powder formula price but rather on the average of prices paid for manufacturing grade milk in Minnesota and Wisconsin. Milk utilized in butter and nonfat dry milk production in this April-July 1974 period should be priced below such Minnesota-Wisconsin price by the amount, not to exceed 50 cents, that the butter-powder formula price is less than the Minnesota-Wisconsin price.

Since mid-1968 in the four northeastern markets and for several years prior thereto in the other four markets, reserve milk (Class II milk under the Boston Regional, Connecticut, Indiana, Middle Atlantic, and New York-New Jersey orders and Class III milk under the Eastern Ohio-Western Pennsylvania, Ohio Valley, and Southern Michigan orders) has been priced at the lower of either the Minnesota-Wisconsin price or a butter-nonfat dry milk formula price. Except for a few occasions, these two pricing formulas have been in close alignment. Annually, the butter-powder formula price and the Minnesota-Wisconsin price have been in relative balance. For instance, the butter-powder formula price averaged 5 cents per hundredweight below the Minnesota-Wisconsin price in 1968, 17 cents below in 1969, 10 cents below in 1970, 6 cents above in 1971, 2 cents below in 1972, and 7 cents below in 1973.

Since January 1, 1969, there have been three periods when the Minnesota-Wisconsin price and the butter-powder formula price varied by more than 25 cents per hundredweight. The first period was October-December 1969 and January-April 1970 when the Minnesota-Wisconsin price varied from 31 to 42 cents over the butter-powder formula price; the second period was in August and September 1973 when the butter-powder formula price exceeded the Minnesota-Wisconsin price 35 and 33 cents,

respectively; and finally, since October 1973, the Minnesota-Wisconsin price has exceeded the butter-powder formula price by \$0.47, \$0.73, \$1.13, and \$1.13 for October, November, and December 1973, and January 1974, respectively.

This current unprecedented price disparity between these two formulas is a result of a \$2.32 increase since July 1973 in the prices paid for manufacturing grade milk as reflected in the Minnesota-Wisconsin pay price series compared to an increase of \$1.00 in the butter-powder formula price. Substantive differences between the two price formulas are likely to continue at least through the immediate peak production months.

Substantial quantities of milk used to produce manufactured dairy products are associated with the eight orders. The annual volume of reserve milk supplies priced under the eight orders in 1971, 1972, and 1973 ranged from 26 to 28 billion pounds. Such reserve supplies have represented about 45 percent of the total volume of Class II and Class III milk priced under all Federal milk orders. Moreover, nearly 40 percent of the reserve supplies in the eight markets is produced during the four-month period, April-July.

When considered collectively for all eight markets, the principal regular outlets for reserve milk is in the so-called soft products such as cream, cottage cheese, ice cream, and ice milk mixes and condensed products. To a lesser extent, reserve milk in the eight markets is also used in hard cheese production. During the months of seasonally high production, significant quantities of butter and nonfat dry milk are processed since producer receipts exceed the volume of milk that can be utilized in the other lowest class use outlets.

The butter-powder formula was adopted under these orders principally on the basis that butter and nonfat dry milk plants were used to process milk in excess of Class I and soft product uses. Recently hard cheese production has increased in this northeastern region and such outlet for milk now accounts for a greater proportion of the market for seasonal reserve milk supplies.

A compelling reason that immediate action be taken is to eliminate the competitive disparity that currently exists between processors of reserve milk in the eight markets under consideration and similar processors in other Federal orders and unregulated processors of manufactured dairy products. The competitive market for products manufactured from reserve milk is essentially national in scope. Hence, dairy products manufactured from Federal order priced reserve milk compete with products made from unregulated manufacturing grade milk. In recognition of this fact, it is essential that prices for reserve milk be maintained at comparable levels among Federal order markets with prevailing competitive pay prices for manufacturing grade milk at plants buying such milk.

Under existing circumstances, the current prices of reserve milk as reflected by the butter-powder price formula is

M-W

the eight markets under consideration are substantially below the competitive market value of milk for similar uses in other Federal orders as well as the prices being paid by unregulated processors of manufacturing grade milk. Processors of reserve milk in the eight markets have a substantially lower milk cost and thus higher gross margins are available to them than for their competitors. This disparity, if permitted to continue, will lead to dislocation of normal production and processing patterns and disruption of normal efficient marketing channels. To achieve competitive equality it is necessary to provide uniform pricing of reserve milk under the eight orders herein considered and the adjacent nearby orders to the West as well as align such prices with the competitive pay prices being paid for the majority of unregulated manufacturing grade milk in the United States. It is concluded, therefore, that this objective can best be achieved through the use of the Minnesota-Wisconsin price series.

It is quite evident that current reserve milk prices in the eight markets herein considered are not providing producers a return for that portion of their milk utilized in manufactured dairy products reflecting its full use value. Producers should not be expected to continue to accept less for their milk not needed for Class I uses than its full use value.

The current lower reserve price levels are provided by the butter-powder price formula are significantly depressing the uniform price received by producers. The amount of this depressing effect on uniform prices varies among markets by the proportion of reserve milk for a particular market in a given month. However, the record evidence indicated that the relative impact on uniform prices of using the butter-powder formula price rather than the Minnesota-Wisconsin price in determining reserve milk prices for the four-month period, October 1973-January 1974, in five markets (New York-New Jersey, Boston Regional, Connecticut, Middle Atlantic, and Eastern Ohio-Western Pennsylvania) was a weighted average reduction of nearly 32 cents per hundredweight.

Under this price depressing situation, dairy farmers are not encouraged to maintain milk production at levels necessary to meet current and anticipated market needs for milk and milk products. For the eight markets under consideration, total producer receipts in 1973 decreased 4.8 percent from 1972. Receipts in December were 4.6 percent below a year ago. The percentage of producer milk utilized in Class I in the eight markets increased from 60.3 percent in 1972 to 62.4 percent in 1973. Utilization of Class I milk in December 1973 was 64.4 percent.

Under these market conditions, an immediate increase in reserve milk prices will help encourage the production of

adequate supplies of milk since total U.S. milk production is less than domestic demand for milk and the markets represent a large proportion of total U.S. milk production.

Certain producer groups strongly urged that the current inequities in reserve milk pricing in the eight orders can best be achieved by immediately suspending the application of the butter-powder price formula. Under this proposal, all reserve milk would be priced at the Minnesota-Wisconsin price. This proposed course of action is not adopted since it fails to consider that some reserve milk during this flush period will have no other available market outlet than in butter and powder production which, at present, is a lower-valued use of reserve milk.

As indicated previously, this decision provides for a special price for reserve milk used to produce butter and nonfat dry milk for the April-July 1974 period at not more than 50 cents per hundredweight less than the price applicable to milk used in other manufactured dairy products. This special price is designed to recognize the lower use value of reserve milk utilized in butter and nonfat dry milk production. It should accommodate the orderly disposition of reserve milk that cannot be utilized in other manufactured products, which may occur during the seasonal flush.

The average prices paid at butter and by-product plants in the U.S. in recent months has not dropped more than 42 cents under the Minnesota-Wisconsin price. An amount in excess of the 50-cent limit adopted, such as the \$1.13 which the butter-powder formula would provide, could result in a special butter-powder price sufficiently below the regular reserve milk price to encourage processors of ice cream and cottage cheese to displace producer milk with nonfat dry milk and butter made from milk priced at the lower special price. The net effect of this potential substitution, if practiced by handlers, would lower total returns to producers.

In order to facilitate and equitably apply this special butter-powder price, the accompanying amendatory orders provide an additional provision to the handler's pool obligation treating the 50 cent price differential as a credit.

To facilitate the marketing of excess milk supplies, milk and cream moved to a nonpool plant for processing into butter and nonfat dry milk should be eligible for the credit to the extent that the amount processed into such products in the plant is sufficient to account for the amount of milk moved to such plant. In the event that there is an insufficient quantity of butter and nonfat dry milk made in a plant to account for the receipts from more than one Federal order source, the quantity processed into butter and nonfat dry milk should be prorated

among those Federal order sources for which a similar price credit is allowed.

Two of the orders, Middle Atlantic and Southern Michigan, contain a provision for payment of excess price to producers. Since the excess price under the orders is based on the lowest class price, the credits on milk used to produce butter and nonfat dry milk appropriately should be allocated against the value of excess milk to the extent that the volume of excess milk is sufficient to cover the volume of milk on which the credit is allowed.

3. *Whether an emergency exists to warrant the omission of a recommended decision.* The due and timely execution of the function of the Secretary under the Act imperatively and unavoidably requires the omission of a recommended decision and opportunity for exceptions thereto on Issue No. 1. The current marketing conditions in the aforesaid marketing areas are such that it is urgent that remedial action be taken as soon as possible. It is necessary to correct at the earliest opportunity the disparity in alignment of reserve milk prices under the eight orders with the order prices in the midwest as well as the prices being paid for manufacturing grade milk. Accordingly, the requests for a recommended decision are denied.

The notice of hearing stated that consideration would be given to economic and emergency marketing conditions relating to the proposed amendments. Certain parties at the hearing requested emergency action be taken. Interim emergency action is necessary pending a detailed review of new pricing formulas presented on the record.

It is therefore determined that good cause exists for the omission of the recommended decision and the opportunity for filing exceptions thereto.

It is apparent from the above that the Judicial Officer was correct in his determination that the Partial Decision, of March 29, 1974, had made proper findings of the existence of an emergency.

C. Plaintiffs are equally incorrect in alleging that the record would not support such findings. As found by the Judicial Officer on pages 41-42 of his decision:

Beginning in October, 1973, while milk throughout the country was in short supply, a wide disparity developed between the M-W and the b-p prices. Accordingly in the 8 milk orders involved in the February hearing the reserve milk (Class II or III) was priced at the lower b-p price and was substantially below the M-W prices as indicated by the following:

October, 1973	\$.47
November,	.78
December,	1.13
January, 1974	1.18
February,	1.19

In view of this significant disparity between what was formally consistent pricing mechanisms and upon a request of several industry groups, the Assistant Secretary of Agriculture convened an emergency hearing and thereafter issued his decision in response thereto.

At the hearing, the Secretary received evidence stressing the need for immediate action to make inoperative the b-p formulas such as:

(a) The gross and wide differences which had developed since October 1973 in the 8 markets between actual reserve milk prices based on the b-p formula and the M-W price (R. pp. 196-204, Exhibit 12);

(b) Under the b-p price, dairy farmers were not receiving returns for milk used for manufacturing products reflective of the competitive market value of either the milk or the milk products (R. pp. 277-303, Exhibit 14);

Paul Hand

*for Mathis
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(c) There was a continuing decrease in the amount of milk being produced in Vermont as a result of increases in production costs and inability to obtain sufficient returns from the sale of milk to cover such costs (R. pp. 357-364);

(d) Need for immediate action (R. pp. 45-73, 247-253, 265-272, 716-724, 1049-1075).

*NFO
NFO, AMPSE v
Vermont, Yankee
milk*

Plaintiffs alleged that because of conflicts in the testimony regarding the emergency situation the Secretary was wrong in finding such emergency existed. The weighing of the record evidence rests solely with the Secretary and the determination that there existed an emergency was solely within his discretion. As stated by the Supreme Court, in United States v. George S. Bush and Company, 310 U.S. 371, 380 (1940); with respect to the application of such discretionary functions:

It has long been held that where Congress has authorized a public officer to take some specific legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. Martin v. Mott, 12 Wheat. 19; Monongahela Bridge Co. v. United States, 216 U.S. 177; Dakota Central Telephone Co. v. South Dakota, 250 U.S. 163; United States v. Chemical Foundation, Inc., 272 U.S. 1. As stated by Mr. Justice Story in Martin v. Mott, *supra*, pp. 31-32:

Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.' Switchmens' union of North America v. National Mediation Board, 320 U.S. 297 (1943); Fahey v. O'Melveny, *Myers*, 200 F.2d 420, 477 (9th Cir. 1952).

It is clear that plaintiffs may not challenge the determination of the Secretary that an emergency existed, but may only demonstrate that there was absolutely no record evidence to support such a conclusion. It is

equally clear that the Judicial Officer correctly found that there was substantial record evidence to support not only a determination that an emergency existed but that the correct solution to such emergency was to relate the price for reserve milk to the M-W price series instead of the b-p price. As concluded by the Judicial Officer at pages 40-41 of his decision:

The hearing record of February 20-28 contains a variety of testimony in support of each of the several categories of proposals noted in Finding of Fact 7 as well as opposition testimony. Likewise the briefs and exceptions filed after the hearing seek to persuade the deciding authorities of the merits or defects of each proposal. While many of the proposals, other than the amendments adopted, appear meritorious in the context of the record evidence (e.g., simple average of the M-W and the b-p prices; use of the b-p in flush production period, etc.) we nevertheless find adequate and substantial record evidence to support the Assistant Secretary's decision.

In support of this conclusion the Judicial Officer cites to his Finding of Fact No. 8 appearing at pages 12-20 of his decision, which states:

. . . The hearing record consists of 1,094 pages and 46 exhibits containing the testimony in support and opposition to the emergency aspects as well as the various proposals contained in the notice. Some of the evidence induced at the hearing is summarized as follows:

The need for higher and adequate prices to dairy farmers prevail throughout the United States. (R. pp. 382-383, 400-401)

NMPF

Additional milk production is needed to insure adequate supply of milk (R. p. 632)

W. H. Hume

During 9 of the 12 months in 1973 the M-W price was lower than the b-p price and was the effective Class II/III price in the 8 market regions. The M-W price is also used as a basic formula price to arrive at the Class I price. (R. pp. 228-229, 635, 821; Exhibit 12, Table 1, Exhibit 14, Table 1)

The butter-powder formula provisions were added to the orders as an alternative basis for pricing reserve milk to assure that the annual price level for reserve milk would not ride above a fixed margin under the market value of butter and non-fat dry milk powder (R. p. 284). Milk supplies in the Northeast have declined steadily and at an alarming rate since mid-1972 (R. pp. 295-297, Table No. 9 of Exhibit No. 14). As a result, the quantity of reserve milk associated with the markets has declined substantially and is no longer the burdensome problem that it was in earlier years. (R. p. 298, Table No. 10 of Exhibit No. 14, Exhibit Nos. 9 and 12). The quantities of reserve milk manufactured into butter and powder likewise, has declined substantially from previous levels, both in absolute terms and as a percentage of reserve milk supply. (R. pp. 297-300, 744-748, 755, Table No. 11 of Exhibit No. 14). Under such conditions which are expected to prevail throughout 1974 and perhaps longer, the elimination of the b-p provision of the 8 orders, should not result in a serious problem in clearing these markets of reserve milk supplies in the foreseeable future (R. p. 300).

Since October, 1973, the b-p price computed pursuant to provisions of the 8 orders had been distorted by imports of butter and non-fat dry milk powder (R. pp. 199, 230-231, 287-292, 402 and 596-598). Said prices had fallen below the M-W prices by 47 cents, 78 cents and \$1.13 in October, November and December 1973, respectively; and by a \$1.18 in January 1974 (R. pp. 199, 588-589, 718 and Table No. 2 of Exhibit 14) [Footnote--the B-P price was below the M-W price by \$1.19 and 73 cents in February and March 1974, and in April and May 1974 the M-W price was below the B-P price (15-A Tr. pp. 24-25).]

The lower reserve milk price which is likely to result from the application of the b-p formula could seriously depress uniform prices payable to producers. The impact through the use of b-p price rather than the M-W price in determining reserve milk prices for the 4-month period of October 1973 through January 1975 in 5 of the 8 markets is as follows:

a. Nearly \$10.7 million has been lost to the New York-New Jersey Pool, as a result of the b-p prices being the determinant of Class II prices.

b. Five markets taken together (Orders 1, 2, 4, 15, 36) have lost a total of nearly \$21 million in the four months since the b-p price has been the reserve milk pricing factor. This has amounted to a weighted average reduction of nearly 32 cents a hundredweight on uniform prices for the four month period. (R. pp. 293-297, 316, Ex. 14, table 8)

While gross dairy income rose about ten percent in 1973, prices paid by dairy farmers for production items were up 20 percent from a year earlier. Progressive decline has been experienced in numbers of dairy farms, in numbers of cows in production, and in productive per cow and in total milk production. This pattern of decline which persisted in 1973 is continuing in 1974; with production in January 1974 three percent less than in January 1973. (R. pp. 53-57, 81-83, Ex. 9)

Regular monthly use of the b-p price as the determinant of reserve milk prices on a long-term basis will depress uniform prices payable to producers. Such price depression would be counter-productive and could result in insufficient supplies and production to meet current and anticipated needs for milk and milk products. This would be contrary to the stated intent of the Act and of the orders promulgated thereunder (R. pp. 294-297).

The progressive departure of the b-p price from the M-W price has resulted in a significant drop in the blend price at a time when dairy producers are experiencing even further increases in their cost of production. Unless the b-p price is eliminated as a pricing mechanism, producers will be forced to discontinue production at a time when milk production is declining rapidly, thus further jeopardizing future milk supplies for this nation (R. pp. 58-59, 92-93, 1052).

In summary, there is some question as to whether the use of a snubber [b-p price] in preference to the Minnesota-Wisconsin price carries out the surplus pricing objective of providing the highest possible returns to producers. It does, of course, provide relief for butter-powder plants during the periods when significant differences between the Minnesota-Wisconsin prices and butter-powder product values prevail. (R. Ex. 40, p. 88).

Dairy farmers suffer a loss of \$275,000 each day that elimination of the b-p formula is delayed. (Exhibit 10, pages 1 and 2, R. p. 1051) The evidence of losses in income to producers, in producer numbers, and in volume of production, clearly requires emergency action in eliminating the b-p price. (R. pp. 1051-1052)

Use of the b-p formula, instead of the M-W price, as the manufacturing class price, for December 1973, decreased the blend prices in Orders 1, 2, 4, 33, 36 and 40 respectively, 38 cents, 47 cents, 54 cents, 23 cents, 28 cents and 46 cents per hundredweight. The gross effect for the month of December 1973, in loss of money returns for the producer milk controlled by said orders was \$8,189,200. (R. pp. 62-63; Ex. 10)

The M-W price reflects the value of milk going into manufactured products. (R. pp. 98, 599) Wisconsin and Minnesota produce approximately 40 percent of the butter in the United States; 50 percent of the cheese; and about 43 percent of the non-fat dry milk. (R. pp. 109-110)

An erosion of the M-W series by use of b-p price now provided in the eight orders, will result in a drastic reduction of milk prices in every federally regulated area in the United States. (R. pp. 144-145)

The Secretary's decision issued February 19, 1974 involving 39 Orders determined that the milk used in the manufactured class, including cheese utilization and butter-powder utilization, should be priced at

the M-W series price. This action by the Secretary, along with similar proposed action regarding the Orders in the north-east would help bring about the orderly marketing and pricing of milk in the United States. (R. pp. 139-140, 1050-1051, 1056-1057)

By eliminating the b-p price, the milk used to manufacture 85 percent of the nation's butter, 97 percent of the nation's cheese and 87 percent of the nation's nonfat dry milk would be priced uniformly, and would provide a strong foundation for orderly marketing. (R. p. 1053)

Manufactured products originating from the eight Order areas are competing with similar products manufactured in the midwestern areas. (R. pp. 307, 665, 714-715, 732)

Importance of maintaining price alignment between Orders 33 and 49, (R. pp. 723, 724, 731).

Producers are now in a critical cost-price squeeze, resulting in the culling of herds, or of many producers going out of the dairy business; the dairy industry in New England and the northeast is facing an uncertain future; and an increase in milk price to the dairy farmer is essential if adequate supplies of milk are to be maintained. (R. pp. 357-364)

Elimination of the b-p formula as the Class II pricing mechanism in Order 49 is necessary to assure handlers of an adequate supply of milk for the Indiana market.

As the result of the b-p formula being the effective Class II price determinant in Order 49, said Order's blend price has been 35 to 40 cents out of alignment with the Chicago Order No. 30 market, affecting common procurement areas (R. pp. 249-255).

Amendments should be accomplished through expedited action, particularly because of the wide differences which have recently developed between the Class II prices resulting from the use of the b-p formula

and the M-W price. The use of the b-p formula results in a substantial increase in the spread between the Class I and Class II price for the current month. The Class I price in Order 4 for January 1974, f.o.b. Philadelphia was \$10.48 per hundredweight, while the Class II price was only \$7.03 per hundredweight. (R. p. 198)

The broad difference between the price of Federal Order milk utilized in Class II products in the northeast Orders (by reason of b-p pricing) and the corresponding price in other Federal Orders, is contrary to uniform pricing among the several Federal Order markets. If this situation continues, serious dislocations will occur in the location of production facilities. Elimination of the b-p should be carried through all of the northeast Orders. (R. pp. 201-202)

The decline in milk production makes it imperative that b-p pricing be eliminated on an expedited basis, by March 1, 1974, if possible. (R. pp. 202, 250-251, 258, 265-272, 370, 47-50, 1052)

Opposition to the removal of the b-p price was generally that:

The removal of the b-p price and the use of the M-W series would result in manufacturing milk prices at levels which would not permit the market to be cleared of surplus milk through ordinary channels (R. pp. 889-90).

The effect of consumer prices and consumer acceptance of dairy products would be adverse (R. pp. 890-892, 896-897, Ex. 34).

The removal of the b-p price would result in inequities between regulated proprietary handlers, and inequities between proprietary handlers and cooperative handlers (R. pp. 897-898).

Consideration of higher manufacturing milk prices in the eight milk orders would not take into account the high Class I prices in the Northeast Orders and the resultant high blends (R. pp. 901-902 and Ex. 34, Chart H).

The M-W series is not an appropriate series on which to base manufacturing milk prices in the Northeast Orders (R. pp. 472, 829, 899).

II. The Record Fully Supports the Secretary's Decision to Use the M-W Series Price.

Plaintiffs next argue that notwithstanding fact that the Secretary may have properly found the existence of an emergency, there was no support in the record for adopting the M-W series price as the price determinant for milk going into manufacturing purposes. It is argued that there existed serious doubt in the industry as to the validity of the M-W series price and that evidence should have been presented at the rulemaking hearing to establish the validity of that price determinant. Furthermore, plaintiffs argue that since the make-up of the series is only known to the officials of the Department of Agriculture, it was incumbent upon the Department to provide it with requested information and the failure to do so was violative of their due process rights.

A. It is apparent that plaintiffs fail to distinguish between record evidence supporting the use of the M-W series price and evidence supporting the validity of the M-W series price. As indicated in the Judicial Officer's Finding of Fact No. 8 set forth above, the record contained an abundance of evidence supporting the use of the M-W series price in preference to any other price determinant. Inasmuch as it was within the Secretary's discretion to decide which price determinant should be used, and there is record evidence supporting the use of the M-W series price, plaintiffs may not challenge that decision. United States v. George S. Bush and Company, supra.

B. Plaintiffs' allegations that the Department violated their due process rights by not making available to them information on the make-up of the M-W series price is equally erroneous. As found by the Judicial Officer at pages 43-45 of his decision:

Petitioners urge that they have been denied a procedural due process by the Department's refusal to provide them certain data concerning the make-up of the M-W price, and that without this information they were unable to properly participate in the amendment hearing of February 20-28, 1974. A rulemaking hearing under the Act is governed by the Rules of Practice appearing in 7 CFR Part 900 and the Administrative Procedure Act (5 U.S.C. 551 et seq.) and there is no provision for general discovery in such rulemaking proceeding. Therefore, the Administrative Law Judge presiding at the February hearing was correct in his ruling that he could not halt the hearing for an assemblage by the Department of Agriculture of data considered desirable by certain participants for use at the hearing. (R. pp. 186-192) Rulemaking hearings are conducted to permit various proponents and opponents of given proposals to come forward to bring to the Secretary's attention such information as it may have, and not to illicit information from the Secretary or the various parties participating in the proceeding. United States v. Wrightwood Dairy Company, 127 F.2d 97 (C.A., 1942).

Furthermore, the Administrative Procedure Act, (5 U.S.C. 551 et seq.) clearly provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The Department of Agriculture is a neutral party in rulemaking proceedings. It is not required to provide data in support or in opposition to any proposal, nor is it obligated to introduce or explain the make-up of the M-W series. Rights petitioners may have to demand information as to the confidential details of the M-W price under statutes such as the Freedom of Information Act, do not include the right to delay an emergency hearing. The rulings by the Administrative Law Judge (R. pp. 191-192) were sound and fully supported by a controlling law.

C. Plaintiffs suggest that the Department has acted inconsistently by objecting to the introduction into the 15(A) proceedings the Deposition of Dwight Morris, former officer of Associated Milk Producers, Inc., (AMPI), while the Secretary in later decisions took official notice of an April 1, 1974, publication by the U.S.D.C. Statistical Research Service entitled "Agricultural Prices". Contrary to plaintiffs' suggestion the deposition of Dwight Morris was considered

by the Judicial Officer in the 15(A) decision, and by the Secretary prior to issuing the final decision permanently amending the northeastern marketing orders. As stated by the Judicial Officer at pages 45 through 49 of his decision:

During the course of the July 15-A hearing, counsel for the Nine Order No. 2 petitioners sought to introduce into evidence at that hearing the deposition of one Dwight Morris dated May 31, 1974. The gist of the deposition was that the M-W series price was "rigged" or manipulated to yield a higher price for payments for certain plants in excess of normal producer paid prices in Minnesota and Wisconsin. The deposition, since it was dated May 31 was subsequent to the rulemaking hearing of February and was ruled inadmissible by me at the July 1974 hearing. The reasons in support of the ruling appear on pages 58 through 59 of the 15-A transcript, to the effect that the Secretary's decision must be judged solely on a rulemaking record evidence. U.S. v. Mills, supra, 315 F.2d at page 836.

Subsequent to the July 15-A hearing, but prior to the Secretary's issuance of his long-range pricing decision, exceptions were filed on July 11, 1974 on behalf of the Nine Order No. 2 petitioners in the rulemaking proceeding. Attached to the exceptions was the deposition of Dwight Morris, offered (page 8) as new matter "which would materially alter the assertions made in the Recommended Decision [of June 21, 1974--Finding of Fact 13]." Further exception was taken to the failure of the Recommended Decision to call for additional hearings to analyze the relative performance of the M-W and the b-p formulas following the date of the February hearing.

In accordance with my Order of November 12, 1974, all briefs and exceptions filed, including petitioners', are here for review in connection with the rulemaking proceeding, along with an affidavit of Robert W. March, [Deputy Director, Dairy Division, Agricultural Marketing Service, U.S.D.A.] filed on October 1, 1974 in rebuttal to the Morris deposition.

The March affidavit satisfactorily refutes any implication of M-W manipulation. Said affidavit states: That the M-W price series is based upon reports from a large number of plants; that higher prices paid at small groups of plants would have little if any influence on the average price from manufacturing grade milk in

the States of Minnesota and Wisconsin; that the Department was apprised of the intent to pay a price in excess of the prevailing average value of milk for manufacturing 16 out of a total of 754 plants; that the prices were monitored closely; and that the prices paid by the 16 plants were within the range of prices paid by other plants and had no significant impact on the M-W price.

The exceptions filed by petitioner were also considered by the Assistant Secretary when he issued his final decision on July 25, 1974. (Finding of Fact 13)

In his ruling on exceptions the Assistant Secretary stated in part:

In exceptions to the recommended decision, certain requests were made to either take no amendatory action or re-open the hearing for the purpose of taking evidence on market developments subsequent to the close of the hearing. Other exceptions purported to discredit the Minnesota-Wisconsin price as of a viable price under the orders and requested that further and more extensive hearings be held on the appropriateness of the Minnesota-Wisconsin manufacturing grade milk price as a price mover under the orders.

Such requests would result, effective August 1, 1974, for an indefinite period, in the orders reverting to the respective prehearing provisions that price milk for manufacturing use on the basis of the lower of the Minnesota-Wisconsin price or the butter-powder formula price. In this circumstance, the requests are inconsistent in that they would continue the use of the Minnesota-Wisconsin price when it is lower than the butter-powder formula price. Such requests, therefore, are essentially directed to the level of price.

The Assistant Secretary's ruling on the exceptions was based in part upon his earlier discussion of the Department's efforts to monitor the M-W series price. The Assistant Secretary's decision (39 F.R. at 27680 states in pertinent part:

The Minnesota-Wisconsin price is a representative pay price reflecting the prices paid to producers in the two-State area wherein about 13 billion pounds or approximately half the total manufacturing grade milk in the United States is produced. It reflects prices paid at the farm level under competitive conditions for manufacturing grade milk used in the major manufactured dairy products. The price is highly responsive to supply and demand conditions for such products that are sold within a marketing system that is national in scope.

The Minnesota-Wisconsin price series is published monthly by the Statistical Reporting Service of the Department and represents an estimate of the prices paid

in these two States for manufacturing grade milk based on reports from 350 plants. In 1972, this two-State average price reflected a weight of about 56 percent for Wisconsin prices and 44 percent for Minnesota prices. These weights represent the proportions of the total volume of manufacturing grade milk purchased from farmers in the respective States.

The two-State price average reflects prices paid for milk used in different manufactured products at plants buying such milk. In 1972, butter and by-product plants accounted for 43 percent of all manufacturing grade milk in Minnesota. Cheese plants accounted for 20 percent and plants manufacturing varied products accounted for the remaining 37 percent.

In Wisconsin, plants used the following proportions of manufacturing grade milk in 1972 according to type of plant: cheese, 85 percent; butter and by-products, 5 percent; and condenseries and varied products, 10 percent.

Each year, the Statistical Reporting Service publishes the results of a comparison of the Minnesota-Wisconsin price with the average price reported paid at all manufacturing plants in the two States (nearly 750 plants). Official notice of the 1973 release of these data was taken at the hearing. This release showed that for the three years 1970 through 1972 monthly reported Minnesota-Wisconsin prices averaged 1.1 cents per hundredweight below what was actually paid.

Close surveillance of the Minnesota-Wisconsin price series is maintained by the Statistical Reporting Service and the Agricultural Marketing Service to assure continued reliability of the series. Investigations bearing on criticisms voiced about the reliability of the series have been undertaken. For example, a number of years ago it was alleged that the reported Minnesota-Wisconsin price overstated prices actually paid because of butterfat testing practices at dairy plants. A study directed at answering this criticism was undertaken by the University of Minnesota, the University of Wisconsin, and the Department of Agriculture of the two States. A copy of this study, released in 1968, was entered into the hearing record. It concluded that the average "overstatement" of milk prices, because of understating butterfat test was 4.1 cents per hundredweight, but this was virtually offset by hauling subsidies that resulted in an understatement of 1.4 cents per hundredweight in reported prices, and cash dividends that resulted in an understatement of 2.1 cents per hundredweight in reported prices for the two States combined.

More recently it has been alleged that the Minnesota-Wisconsin price overstates the value of manufacturing milk because dual-intake plants (receiving both manufacturing grade and milk eligible for fluid markets) are included in the sample and Grade A proceeds are used to subsidize manufacturing grade milk operations. To provide the facts of the situation, special tabulations for 1970

and 1973 were made by the Statistical Reporting Service. Such tabulations show that Grade B plants paid slightly higher average prices for manufacturing grade milk than did dual-intake plants. Grade B plants in Minnesota paid an average of 2 cents more per hundredweight than dual-intake plants both in 1970 and 1973. In Wisconsin, Grade B plants paid an average of 5 cents more in 1970 and 1 cent more in 1973 than was paid for manufacturing grade milk at dual-intake plants. (The 1970 tabulations were entered into the hearing record, but both the 1970 and 1973 tabulations are shown in Supplement No. 1 to the April 14, 1974, issue of *Agricultural Prices*, official notice of which is taken.)

The allegations made on the record challenging the validity of the Minnesota-Wisconsin price series as a proper determinant of manufacturing milk values are unfounded. Moreover, because the Minnesota-Wisconsin price is a free market pay price resulting from competitive bidding among unregulated processors for milk for various manufacturing uses, it is the best measure available of changes in the value of milk for manufacturing.

The Minnesota-Wisconsin price is the sole basis (effective August 1, 1974) of pricing milk in the lowest price class under 48 of the 53 Federal milk orders in effect outside the northeastern markets. The 39-market uniform classification and pricing decisions (39 FR 8202 and 8452) adopted the Minnesota-Wisconsin price as the reserve milk price. These decisions provided a continuation of the Minnesota-Wisconsin price as the reserve milk price in 24 markets and expanded its use to 15 additional markets. The five markets, outside the Northeast, which use the Minnesota-Wisconsin price as an alternative price for reserve milk rather than the sole basis of pricing such milk are in the western part of the country; namely, Black Hills, Western Colorado, Inland Empire, Puget Sound and Oregon-Washington. Therefore, use of the Minnesota-Wisconsin price for reserve milk pricing in the northeastern markets would result in uniform pricing of virtually all reserve milk priced under Federal milk orders except for the Pacific Northwest States, since only a very small quantity of reserve milk is priced under the Black Hills and Western Colorado orders.

In response to plaintiffs' allegation that the Secretary's consideration of the April 1, 1974 issue of Agricultural Prices, which is an official publication of the Department of Agriculture, was an improper consideration of after-hearing evidence, the Judicial Officer at page 40 of its decision properly found:

Finally there was full compliance with the requirements of the Administrative Procedure Act (5 U.S.C. 556(e)) and section 900.8(d)(5) of the Department's rules of practice when official notice of official governmental publications was taken in the recommended decision of June 21, 1974. This provided all parties including the petitioners an opportunity to review such material and to show that such facts were inaccurate or erroneously noticed prior to the final decision of July 25, 1974.

D. The Secretary's permanent amendment decision in the eight northeastern orders states that it is based in part upon a need to align prices between these orders and other federal orders, which had already been amended to make the M-W series price the determinant for surplus milk. The decision issuing the amendments of these other federal orders has become known in this proceeding as the "thirty-nine order decision". That decision was issued on February 19, 1974, and was announced by a press release distributed to the participants of the February 20-28 hearing on the opening day. The entire decision itself was not published until it appeared in the Federal Register in the beginning of March, 1974. Plaintiffs allege that they were denied due process by not being provided copies of the entire decision during the course of the rulemaking proceeding. The Judicial Officer found no such denial of due process and stated at pages 52 through 55 as follows:

On February 19, 1974, the Assistant Secretary issued four decisions providing for amendment of the classification of price provisions of 39 milk orders other than those amended by the decisions herein challenged. The 39 order decision, whereby reserve milk was priced

in each of those orders on the basis of the M-W, was an extremely lengthy document (see Finding of Fact 10) and the Department was not able to provide the public with copies until the Decisions were actually published in the Federal Register in four parts on March 4, 5, 6, and 7, 1974. The Department issued and circulated a press release at the rulemaking hearing on February 20, 1974, announcing the issuance of the 39 Order decision in advance of the Federal Register publication dates. Official notice was taken of the rulemaking hearing (R. pp. 138-140).

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The major single point determination of the decisions affecting the 39 Milk Marketing Orders of consequence here was that the M-W price would be utilized in the future as the sole Class II price for all the 39 orders and . . . [plaintiff] was aware of this at the rulemaking hearing. (R. p. 822) Aside from this one point it is doubtful that the remaining contents of the 39 order decision would have probative value in terms of factual data for presentation in the 8 order rulemaking hearing. Having obtained official notice of a 39 order decision, the parties to the February hearing were at liberty thereafter to argue, compare, analyze and draw any conclusion they believe meritorious in briefs and exceptions concerning the 39 order decision and the 8 order hearing in which they participated.

However, they was only minor reference to the 39 order decision following publication in the Federal Register in the briefs and exceptions filed after the February hearing. Passing reference was made in the Leigh exceptions of July 11, 1974 and brief of May 14, 1974 to the 39 order decision and how they had been withheld at the February hearing. A dairy cooperative federation in its brief of April 17, 1974 discussed, at pages 9-11, how the decision had not properly evaluated the exceptions filed in that proceeding. The March 29, 1974 brief of the National Farmers Organization at pages 5-11 contained excerpts from the 39 order decision to show "the gross inconsistencies with such decision that would result if the butter-powder formula issues as a price determined in the 8 orders."

Except for the NFO brief it is apparent that the participants at the February hearing displayed little interest in the contents of the 39 order decision aside from the fact that the M-W price would be utilized as the Class II price in those 39 orders.

The Assistant Secretary's decisions regarding the realignment of the Eight Order Class II prices with such prices and other Federal Orders is not inconsistent with sections 608c(11)(A) or (C) of the Act. The need to align prices via the M-W price and eliminate the b-p price was based on substantial record evidence reflecting economic and marketing conditions in the Eight Order Marketing areas. In no sense can such action be construed as the issuance of a single order "applicable to all production areas and marketing areas (608c(11)(A)). In connection with this section 608c(11)(C), that section provides the issuance of orders describing different terms for the same commodity only "sofar as practicable" and "as the Secretary finds necessary" to give recognition to differences in production and marketing of milk or or of its products in different areas. Section 608c(11) has no adverse application to the actions of the Assistant Secretary which are considered here. Furthermore we see no inconsistency in the Assistant Secretary's decision and orders with 608c(5)(A) of the Act, since the reserve milk prices established is "uniform to all handlers".

Furthermore, the Judicial Officer found that whatever competitive disadvantages plaintiffs may suffer, it is in no way the result of the Secretary's amendments of Order No. 2. In his decision at pages 51-52 the Judicial Officer states:

The petitioners who challenge the Order amendments are under no requirement to purchase Order producer milk, and are permitted under the Order to purchase milk from other sources. They only pay the Order Class II price on such milk as is producer milk under the Order which they utilize for Class II purposes. It is to their economic advantage to purchase producer milk under the Order at those times when the Class II price is lower than prices at which they can obtain milk from other sources. When petitioners do choose to purchase Order 2 milk, they are only held accountable for the Class II price, being reimbursed from the producer-settlement fund for any differences between the blend price paid farmers and the Class II price.

Even if petitioners' circumstances are so unique that they find it difficult to meet the price that all of their competitors subject to the Federal Order Program must pay, this is not sufficient ground for upsetting the Secretary's decisions. As stated in United States v. Mills, *supra*, at 838: "Absolute equality is not demanded to sustain the operation of

the Order. If the Secretary cannot 'produce complete equality for the variables are too numerous', he 'fulfills his role when he makes a reasoned' order. Mitchell v. Budd, 350 U.S. 473, 480 (1956)"; see also United Milk Producers of New Jersey v. Benson, 225 F.2d 527, 529 (C.A. D.C., 1955).

•In essence the thrust of plaintiffs' arguments are that they are not being protected by this amendment but are being forced to compete on the open market with all other purchasers of fluid milk from manufacturing purposes. As set forth in the earlier statement of the economic background of the Order, it is the purpose under the Agricultural Marketing Agreement Act of 1937 to protect farmers and not milk processors. There is absolutely no reason why a farmer who bears the expense in the north-eastern area of producing Grade A fluid milk should receive a lesser return on his investment than a farmer located in Minnesota and Wisconsin who does not have to operate a Grade A farm and who produces milk solely for manufacturing purposes. Plaintiffs are not obligated to purchase Grade A fluid milk, they are not required to pay any more than the established Class II price for such milk and are reimbursed the difference between the uniform blend price and the Class II price. They are able to purchase large quantities of milk during the flush season at a lower price and manufacture such milk into products which can be stored for year round distribution. They are not required to transport their product long distances in order to place it in the major portion of their market. In short, plaintiffs solely seek to challenge the amendments to these orders in the hopes that they could enjoy windfall profits by being able to pay the b-p formula price whereas all other federally regulated handlers and the unregulated plants in Minnesota and Wisconsin would be forced to pay the M-W price. As found by the Judicial Officer at page 49 of his decision:

The Assistant Secretary's observation that the exceptions were essentially directed at the level of price rather than the efficacy of the M-W price is supported by the record evidence. Basically petitioners want a continuation of the earlier order provision which priced at the lower of the M-W or the b-p price. No alternative to the M-W price was proposed or even suggested [15-A Tr. pp. ;08-109]. No challenge was made to other order provisions which are structured upon the M-W price series (e.g. the price of Class I milk), nor is there a challenge to the use of the M-W price as the effective price determined for Class II milk under the orders prior to their amendment at those times when the B-P formula did not apply.

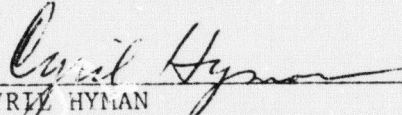
The Nine Order No. 2 petitioners, as handlers under the Order, were interested in obtaining the lowest price for milk use for manufacturing uses. They supported the use of the lower M-W price in nine months of 1973 (R. pp. 447-448) as well as the lower b-p price in the last three months of 1973 (R. p. 466). The proposals to eliminate the b-p price as the effective price in those future months when it might be below the M-W, would conceivably reduce the petitioners profit margins.

Conclusion

It is respectfully submitted that, for reasons stated herein, and based upon a review of the entire record, the Decision of the Judicial Officer of the Department of Agriculture dismissing plaintiffs Petition was in accordance with law and therefore Defendant's Cross Motion for Summary Judgment should be granted and Plaintiffs' Complaint dismissed.

Respectfully submitted,

David G. Trager
United States Attorney

By: 
CYRIL HYMAN
Assistant United States Attorney

Of Counsel:

Daniel W. Wentzell
Attorney
United States Department of Agriculture
Washington, D. C. 20250
Telephone: (202) 447-3462

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the _____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

United States Attorney,
Attorney for _____

To: _____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the _____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,

_____, 19____

United States Attorney,
Attorney for _____

To: _____

Attorney for _____

Civil Action

No. 75 C 1517

UNITED STATES DISTRICT COURT
Eastern District of New York

FRIENDSHIP DAIRIES, INC.,
et al.,

Plaintiffs,

—Against—

EARL BUTZ, etc.,

Defendant.

DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM OF LAW

DAVID G. TRAGER

United States Attorney,
Attorney for DEFENDANT
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
_____ is hereby admitted.

Dated: _____, 19____

Attorney for _____

CYRIL HYMAN,
AUSA & DEP CHF CIVIL DIV.
(212) 330-7977

DECISION AND ORDER OF NEAHER, U.S.D.J. ON MAY 18, 1977
DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (pp. 1451a-1470a)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x

FRIENDSHIP DAIRIES, INC., et al.,

Plaintiffs,

75 C 1517

-against-

EARL BUTZ, SECRETARY OF THE
DEPARTMENT OF AGRICULTURE OF THE
UNITED STATES,

MEMORANDUM
AND
ORDER

Defendant.

----- -x

APPEARANCES:

BOOTH, LIPTON & LIPTON
Attorneys for Plaintiffs
By DAVID C. TOOMEY, ESQ.
DUANE, MORRIS & HECKSCHER
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By CYRIL HYMAN, ESQ.
Assistant U. S. Attorney

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Attorneys for Intervenor Pennsylvania
Dairymen's Cooperative Federation, Inc.
By DONALD F. COPELAND, ESQ.
SPRESE, BONGIOVANNI & COPELAND
(Philadelphia, Pa.), of Counsel

NEAHER, District Judge.

Plaintiffs, nine manufacturers of milk products ("handlers"), brought this action pursuant to §15(B) of the Agricultural Marketing Agreements Act ("Act"), 7 U.S.C. §608c(15)(B), for judicial review of a ruling by the Secretary of Agriculture ("Secretary") which amended a milk marketing order ("Order No. 2"), 7 C.F.R. §1002, so as to change the formula for calculating minimum milk prices to be paid by handlers to dairy farmers ("producers"). The matter is now before the court on the parties' cross-motions for summary judgment.

I.

In accordance with the Act, the Secretary has issued 61 orders regulating the marketing and pricing of milk in various regions of the country. Order No. 2, which covers the eastern part of New York and the northern part of New Jersey, divides milk into two categories: milk used in its fluid state is in Class I, while milk used in the manufacture of other dairy products, such as butter and cheese, is in Class II. Prior to the amendment in question, the price for Class II milk (also known as "reserve milk") was the lower of the prices derived from two alternative formulas:

(1) the Minnesota-Wisconsin ("M-W") Series, which is an average of the actual prices paid for milk by selected cheese plants in Minnesota and Wisconsin, and (2) the butter-powder ("b-p") formula, which is based on the public prices paid for butter and nonfat dry milk powder. Generally the two formulas produced fairly similar prices.

Beginning in October 1973, however, the b-p price dropped precipitously below the M-W price due to imports of butter and nonfat milk powder. Thus the b-p formula became the determinant of Class II prices. The decline in the price of Class II milk occasioned by this change led producers to request the Secretary to hold hearings concerning the continued efficacy of the b-p formula.

Responding to the producers' request, the Department of Agriculture issued notice on February 12, 1974 to consider proposed amendments to eight orders, including Order No. 2, covering the northeastern part of the country and to consider whether emergency marketing conditions warranted omission of a recommended decision. As published two days later in the Federal Register, the notice contained 17 proposals for changes in the Class II milk pricing provisions.

The day before the hearing began the Department issued four decisions covering 39 midwestern orders ("the 39 order decisions") which eliminated the b-p price from the pricing formulas of the 15 midwestern orders which had used it and made the M-W price the sole determinant of Class II milk prices in all 39 orders.

The hearing on the northeastern orders was conducted in Washington, D.C. for six days between February 20-28, 1974. The hearing record consists of 1094 pages and 46 exhibits. The parties were given eight days from the conclusion of the hearing to submit briefs. On March 27, 1974 the Assistant Secretary issued a "partial decision" in which he announced an emergency amendment removing the b-p formula as an alternative method of pricing Class II milk from April 2 through July 31, 1974. 39 FR 11567 (Mar. 29, 1974). An order issued two days later confirmed the following temporary pricing scheme: the price of milk utilized in manufacturing products other than butter and nonfat dry milk would be the M-W price, and milk utilized in butter and nonfat dry milk production would be priced below the M-W price by the amount, not to exceed 50 cents, that the b-p price was below the M-W price. 39 FR 11380 (Apr. 2, 1974).

1455a

On June 25, 1974 the Associate Administrator issued a recommended decision that the M-W Series be the permanent basis for determining the Class II milk price. 39 FR 23063 (June 26, 1974). Following a period of time for the filing of exceptions, the Assistant Secretary adopted the recommended decision on July 25, 1974. 39 FR 27678 (July 31, 1974). After the requisite two-thirds of the producers approved the decision, an order was issued on August 21, 1974 in conformity with the decision. 39 FR 30925 (August 27, 1974).

Plaintiffs' administrative appeal was denied by an administrative law judge on June 2, 1975 in an initial decision. This was adopted as the final decision by the Judicial Officer, on behalf of the Secretary, on August 26, 1975. Plaintiffs then commenced the instant action to review the final decision.

II.

The Act empowers the court to remand the proceedings to the Secretary if his ruling is "not in accordance with law." 7 U.S.C. §608c(15)(B). The court's function is limited to "ascertaining whether or not his findings are

supported by any substantial evidence and his conclusion authorized by law." New York State Guernsey Breeders' Co-op. v. Wickard, 141 F.2d 805 (2 Cir.), cert. denied, 323 U.S. 725 (1944).

A. Standing

Before turning to the merits of plaintiffs' appeal, defendant's challenge to the standing of six of the nine plaintiffs must be considered. As to two of them, Cuba Cheese Co. and Pollis Dairy Products, Inc., defendant contends that Congress conferred standing only on "handlers" and that these two companies are not handlers because they are not subject to regulation under Order No. 2. Although the suppliers of these dairy processors are subject to regulation, defendant likens the two companies to consumers, who were denied standing in Rasmussen v. Harkin, 461 F.2d 595 (9 Cir.), cert. denied, 409 U.S. 933 (1972).

In Harry M. Price & Sons v. Harkin, 425 F.2d 1137 (5 Cir. 1970), cert. denied, 400 U.S. 1009 (1971), a similar case involving a handler not directly regulated by the order in question, the Fifth Circuit held that the plaintiff had standing because it was "arguably within the zone of interests

of the statute" within the rule of Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). See also Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971). The Act includes "processors" within the definition of "handlers" without limitation to "regulated processors." 7 U.S.C. §608c(1). Therefore, the court holds that these two unregulated processors have standing to join in this suit because they are adversely affected by the Secretary's action and they are arguably within the zone of interests of the Act.

Defendant also seeks the dismissal of Friendship Dairies, Inc., Crowley Food, Inc., Saratoga Dairy, Inc. and Deltown Foods, Inc. because they are not located in this district as required by 7 U.S.C. §608c(15)(B). This provision, which speaks in terms of jurisdiction, is similar to a venue statute. Cf. 1 Collier on Bankruptcy ¶2.14 (Section 2a(1) of the Bankruptcy Act, which uses the term "jurisdiction", pertains to venue). Thus, although these four plaintiffs alone would have been required to sue in their home district, the court will allow them to remain in the action since they are directly affected by the amendment to the order and have participated in all previous steps in this

litigation.

Plaintiffs have raised three objections to the amendments: (1) the manner in which defendant proceeded in issuing these orders violated due process and statutory provisions; (2) the amendment to the order is not supported by substantial evidence; and (3) local conditions were not reflected in the amendment as required by statute.

B. Due Process

Plaintiffs' first argument is directed at the hurried nature of the proceedings. This issue ultimately turns on whether the record supports such emergency measures.

Plaintiffs begin by charging that they did not receive "due notice" of the hearing as required by 7 U.S.C. §502c(3). There is no question that notice was given. Their objection is that the Secretary allowed only six days between the notice of the hearing in the Federal Register and the date the hearing began. The notice, however, was issued eight days before the hearing, and there was evidence that some of the plaintiffs were notified by mail as early as sixteen days before. In any event, three days notice is deemed to be

due notice of a hearing on an amendment. 7 U.S.C. §608c(17); 7 CFR §900.4(a).

While plaintiffs contend that they should have been afforded more time to prepare their opposition to the important amendments proposed in this case, the need for expediting the proceedings was reasonably apparent, as will be shown below. Therefore, due process was not violated by the timing of the notice. See Ideal Farms, Inc. v. Benson, 181 F. Supp. 62 (D.N.J. 1960), aff'd, 288 F.2d 608 (3 Cir. 1961), cert. denied, 372 U.S. 965 (1963); Carnation Co. v. Bats, 372 F. Supp. 883, 889 (D.D.C. 1974). Apposite here is the more recent comment in Condor Operating Co. v. Sawhill, 514 F.2d 351 (Em. App. 1975), cert. denied, 421 U.S. 976, where the need for a "freeze" in respect of crude oil transactions was challenged. In reversing the district court's injunction against enforcement, the court observed:

"Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary to accomplish legitimate purposes rendered necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate." Id. at 359.

Here, Congress itself provided for the shortened hearing notice adopted by the Secretary.

The remainder of plaintiffs' procedural argument challenges the legality of the post-hearing procedures. These objections are directed at the issuance of the temporary amendment in the partial decision of March 27, 1974. Plaintiffs contend that they were improperly deprived of a recommended decision and an opportunity to file exceptions thereto. The Administrative Procedure Act requires a recommended decision unless "the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires." 5 U.S.C. §557(b)(2). Plaintiffs also object to the Department's failure to publish its partial decision 30 days before its effective date. Such a failure can only be excused by "good cause found and published with the rule." 5 U.S.C. §553(d)(3).

In the partial decision of March 27, 1974 the Assistant Secretary offered the following summary of his reasons for finding that this case fell within the exceptions to the procedural requirements noted above:

"The due and timely execution of the function of the Secretary under the Act imperatively and unavoidably requires the omission of a recommended decision and opportunity for exceptions thereto on Issue No. 1 [the immediate need for abolishing the b-p formula]. The current marketing conditions in the aforesaid marketing areas are such that it is urgent that remedial action be taken as soon as possible. It is necessary to correct at the earliest opportunity the alignment of reserve milk prices in the midwest as well as the prices being paid for manufacturing grade milk."

In the order instituting the amendment on March 29, 1977,

the Assistant Secretary made the following additional finding:

"It is necessary in the public interest to make this order amending the order effective April 3, 1974. Any delay beyond that date would tend to disrupt the orderly marketing of milk in the marketing area.

"The provisions of this order are known to handlers. . . . The changes effected by this order will not require extensive preparation or substantial alteration in method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making this order amending the order effective April 3, 1974, and that it would be contrary to the public interest to delay the effective date of this amendment for 30 days after its publication in the Federal Register."

Although these explanations may in part paraphrase the statutory language, this is not improper if there is "firm

basis in the record" for the findings. United States v. Mills, 315 F.2d 828, 833 (4 Cir.), cert. denied, 375 U.S. 819 (1963).

After a thorough examination of the record, the court finds that there is "firm basis" to support the conduct of proceedings on an emergency basis. The record contains substantial evidence of the serious problems confronting producers in the Order No. 2 area and of the potential for disruption of normal marketing channels as a result of the 39 order decisions covering most of the remaining marketing areas of the country.

The first factor supporting expedited procedures was the deteriorating state of marketing conditions then present in the Order No. 2 region. In the year prior to October 1973, costs to the dairy farmers had increased 20% while prices were going up only 10%. A comparison of October 1973 with the previous October showed a decline of 1,483 producers and 39,248,897 pounds of production. If the trend were allowed to continue, shortages of milk would have been the likely result.

Actions by the federal government added to the

difficulties faced by the dairy farmers. Huge shipments of butter and nonfat dry milk powder were allowed to be imported into the country. As a result, the butter-powder price dropped uncharacteristically far below the M-W price. At the time of the hearing there was no indication of a change in the governmental policy favoring imports.

In essence, this meant that dairy farmers were facing hard times and needed some means of overcoming the resulting problems. When the M-W price rose dramatically at the end of 1973 they realized that they could overtake rising costs by using that price alone. From October 1973 to January 1974 dairy farmers regulated by Order No. 2 received \$10,700,000 less under the b-p price than they would have obtained if the M-W price had been in effect. If price relief were not given immediately, more producers would drop out of the picture.

Further insight into the problem can be gained from the following statement by the Assistant Secretary in his partial decision:

"It is quite evident that current reserve milk prices in the eight markets herein considered are not providing producers a return for that portion of their milk utilized in manufactured dairy products reflecting its full use value. Producers should not be expected to continue to accept less for their milk not needed for Class I uses than its full use value." 39 FR 11568.

The second factor in favor of the expedited procedures was the disparity in prices paid for reserve milk in the northeast as opposed to the prices in the majority of the orders throughout the rest of the country. The 39 order decisions had recently added 15 orders to the 27 which already used the M-W price as their sole pricing mechanism. Maintaining the b-p price in the northeast would have disrupted marketing channels and led to dislocation of production facilities, for the competition in reserve milk was nationwide. Eliminating the b-p price in the northeast, on the other hand, would immediately provide a strong foundation for orderly marketing, for then over 85% of the nation's butter, cheese and nonfat dry milk powder would be priced uniformly.

Plaintiffs object to the Department's basing its decision in part on the 39 order decisions. The decisions were issued only the day before the hearing began in this

case. Copies of the decisions were not available during the hearing. All that was known was that the b-p price had been dropped. That information, however, was entirely sufficient. The text of the decisions would not have aided plaintiffs, for the result alone caused the problems of price competition with the northeast orders.

These factors taken together present sufficient reason for the expedited action by the Secretary. That the order under consideration had only a temporary effect is an important consideration. The final decision with respect to long-term pricing followed the normal, more deliberate procedures required by the Administrative Procedure Act.

C. Substantiality of the Evidence

The finding of substantial evidence in support of the procedural aspects of this case goes far toward establishing that there was substantial evidence in support of the Secretary's substantive decision. Since the "emergency" centered around the continued use of the b-p price in the northeast orders, it was reasonable to resolve the emergency by eliminating that price from the pricing formula.

Plaintiffs nevertheless argue that the amendment was not supported by substantial evidence because there is doubt about the validity of the M-W Series. In particular they point to the Secretary's admission that there is no regular effort to verify the prices which comprise the Series. They also contest the Secretary's refusal to produce evidence of its validity.

The flaw in this argument is that the hearing did not concern the question of dropping the M-W Series. All of the 17 proposals examined at the hearing retained the M-W Series in the pricing formula. In fact, the handlers supported the M-W Series, as long as the b-p snubber was also maintained. The M-W Series, in effect, was a "given" of the hearing. A challenge to its validity was beyond the scope of the hearing.

The b-p price was introduced in Order No. 2 in 1968 as an alternative to the M-W price. It was designed to clear burdensome supplies of reserve milk from the market by assuring that the price level for reserve milk would not rise above a fixed margin under the market value of butter and nonfat dry milk powder. Due to a substantial decline in

milk supplies since mid-1972, the problem of reserve milk was no longer a serious problem at the time of the hearing. Thus the b-p price had outlived its usefulness and had even turned into a distinct liability as a result of the large gap which had developed between it and the M-W price.

The 39 order decisions added to the adverse impact of the b-p price, for the sharp price disparity between the northeast and midwest would have further disrupted marketing conditions. Price alignment is a legitimate concern of the Secretary, and in this case he properly decided that such alignment was necessary. See Sunny Hill Farms Dairy Co. v. Hardin, 446 F.2d 1124 (8 Cir. 1971).

The dairy farmers wanted higher prices and the handlers wanted to keep the status quo. The evidence at the hearing revealed the need for higher prices to ease the price-cost squeeze experienced by the dairy farmers and to avoid the unsettling competition with the midwest. Therefore, the b-p price was dropped.

This decision is in keeping with the principles set forth in a major study undertaken in 1968 by the University of Wisconsin and the University of Minnesota. The study,

introduced as an exhibit at the hearing, gave the following explanation of the importance and function of reserve milk pricing:

"Some reserve supply is necessary and desirable to insure an adequate supply of milk.

* * * * *

"A major objective of surplus pricing is to assure the orderly marketing of the reserves associated with an adequate supply. An equally important objective of surplus pricing is to promote the utilization of available supplies of milk in those uses which will provide the highest possible return to producers, consistent with cost-price relationships for manufactured products." Exh. 40 at 9-10.

The study also warned: "Care should be taken to see that the snubber formula [i.e., the b-p price] is realistic and up-to-date in terms of processing cost allowances." Id. at 6.

The voluminous administrative record attests to the substantiality of the evidence supporting the amendment dropping the b-p price. Despite the expedited nature of the proceedings, it is apparent that the opposing viewpoints of the handlers were sufficiently presented. The court may not reweigh the evidence or substitute its own views as to the advisability of the amendment. That function belongs to the Secretary.

D. Regional Differences

Finally, plaintiffs argue that the Secretary violated the Act's requirement that orders be adjusted area-by-area to take into account differences in marketing, costs and other economic factors. 7 U.S.C. §608c(5)(A), 608c(11). The Secretary, however, clearly considered local conditions in Order No. 2. Based on the evidence he concluded that the problems facing producers in Order No. 2 at the time of the hearing called for the elimination of the b-p price. That handlers in Order No. 2 have higher costs than those in Minnesota and Wisconsin did not override the need to align Order No. 2 prices with those in the other major orders throughout the country. The Secretary's action does not violate the requirement that differences among the orders be taken into account "so far as practicable." 7 U.S.C. §608c(11)(C).

In conclusion, it is important to recall that the Act is designed to improve marketing conditions for the benefit of producers. Washington Milk Co. v. Nishan, 140 F.2d 97, 101 (2 Cir. 1944); Lewis Dairy, Inc. v. Freeman, 401 F.2d 308, 141 (3 Cir. 1968). The Act empowers the

Secretary to make adjustments to milk prices "after due notice and opportunity for hearing" when he finds such action "necessary on account of changed circumstances." 7 U.S.C. §608c(18). The Secretary properly exercised his authority in this case, for there is substantial evidence in the record and his actions were in accordance with law.

Accordingly, plaintiffs' motion for summary judgment is denied and defendant's motion for summary judgment dismissing the complaint on the merits is granted.

SO ORDERED.

/s/ EDWARD R. NEAHER
 U. S. D. J.

Dated: Brooklyn, New York
 May 18, 1977

COURT OF APPEALS
SECOND CIRCUIT

FRIENDSHIP DAIRIES, INC., POLLIO DAIRY
PRODUCTS CORP., CROWLEY FOODS INC.,
QUEENSBORO FARM PRODUCTS INC., SARATOGA
etc.,

Plaintiffs-Appellants.,
- against -

EARL BUTZ, SECreTary of the Deppartment of
Agriculture of the United States,
Defendant-Appellee,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 15th day of Sept. 1977 at 1. 225 Cadman Plaza; Brooklyn, N.Y.
2. One Battery Park Plaza; N.Y., N.Y.

deponent served the annexed
Appendix

Brief

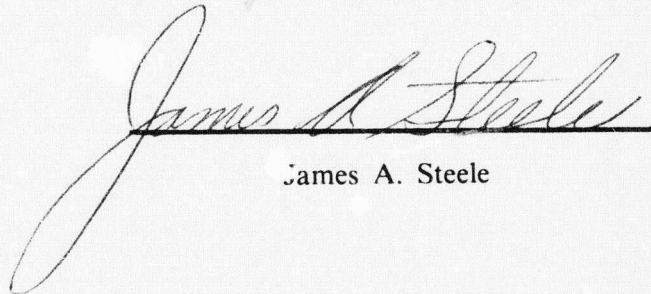
1. David Trager; U.S. Atty East Dist. ^{upon}
2. Roger Doering; c/o Simpson Thatchner &
Bartlett, Esqs

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 15th
day of Sept., 19 77



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979



James A. Steele